No. 82-1213

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

BENJAMIN QUARLES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Questions Presented

1. Whether the Court of Appeals of the State of New York properly excluded the defendant's statement, "The gun is over there," as being elicited in violation of his federal constitutional rights where the police had probable cause to believe that he had just committed an armed felony and disposed of the gun in the immediate vicinity of where he was standing in a supermarket.

2. Assuming, *arguendo*, that question one is to be answered in the affirmative, whether the Court of Appeals of the State of New York properly excluded the defendant's gun, which was recovered from a carton a few feet from the defendant, as a fruit of the constitutional violation.

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Opinion Below

The opinion of the Court of Appeals of the State of New York, not yet reported, appears in the appendix hereto (pp. 6a-14a).

Jurisdiction

The decision of the Court of Appeals of the State of New York was entered on November 18, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

Constitutional Provisions Involved

FIFTH AMENDMENT

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

FOURTEENTH AMENDMENT

Section 1 ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Statement of Facts

Introduction

Acting upon apparently reliable information given to him by a woman who claimed to have been raped at gunpoint, a police officer found a man, the defendant, who precisely fitted this victim's description, at the precise place designated by her, namely a supermarket. Apprehending the defendant, who was carrying an empty shoulder holster, after chasing him through the store, the officer (without giving any *Miranda* warnings) asked him where the gun was. The defendant indicated a carton a few feet away, and the officer there recovered a loaded revolver. As a result, the defendant was indicted for criminal possession of a weapon in the third degree.

Upon a motion to suppress both evidence of the defendant's statement about the revolver's location and the gun itself, a hearing was held upon both phases of the motion.

The motion was granted in all respects by an order suppressing both the gun and the declaration, accompanied by an opinion.

Upon an appeal by the People to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, that order was affirmed without opinion On appeal, by leave to the Court of Appeals of the State of New York, the order of the Appellate Division, Second Judicial Department, was affirmed by a 4 to 3 decision.

The Evidence

On September 11, 1980, Police Officer **Frank Kraft** and his partner, Officer **Sal Scarring**, were in uniform and driving their patrol car eastbound on 47th Avenue and Francis Lewis Boulevard when they were approached by a young woman who stated that she had just been raped at gunpoint and asked for their assistance. She described the rapist as a black man, approximately six feet tall, wearing a short black jacket with "Big Ben" in yellow letters on the back, and declared that he had gone into the A & P store on Francis Lewis Boulevard.

Kraft drove the woman to the front of the store, which was about a quarter of a block north of the point where he had stopped. As Officer Scarring called for assistance, Kraft went to the front of the store. There, he saw the defendant, who matched the description given by the woman, approaching the checkout counter.

Upon Kraft's appearance in the doorway, the defendant fled from the checkout counter to the rear of the store.

Kraft gave chase, lost sight of the defendant for 15 or 20 seconds, caught up to him, and told him to stop and put his hands over his head. As other police officers were arriving on the scene, Kraft frisked the defendant, discovering an empty shoulder holster, then handcuffed his hands behind his back and asked him where the gun was. The defendant looked in the direction of a carton approximately four feet away and said, "the gun is over there." Kraft searched in the carton and found a loaded revolver—the subject of the *Mapp* phase of this motion. He then informed the defendant that he was under arrest, read the *Miranda* warnings to him and asked him if he owned the gun, to which the defendant replied in the affirmative. Kraft then asked where he had purchased the gun and the defendant said, "Miami, Florida."

The Decision on the Hearing

By order dated April 3, 1981, the hearing court granted the defendant's motion to suppress statements and physical evidence. In a memorandum decision accompanying the order, the hearing court stated that the defendant was "entitled to the *Miranda* warnings before any questioning as the police had reasonable cause to arrest and the officers' safety was not in question." A copy of the hearing court's order and memorandum decision is annexed hereto (pp. (1a-5a).

The Appeal to the Appellate Division

Upon appeal to the Appellate Division of State Supreme Court, Second Judicial Department, the People contended that the single question, "where is the gun" did not constitute interrogation under *Miranda* v. *Arizona*, 384 U.S. 436

(1968) because it was a prudent protective measure attendant to the defendant's arrest and custody and that, even were the declaration of the defendant regarding the location of the gun to be deemed improperly obtained, the gun itself need not have been suppressed because it would inevitably have been discovered, even absent the statement. However, the Appellate Division unanimously affirmed the hearing court's order without opinion.

The Appeal to the New York Court of Appeals

On appeal, by leave, to the New York Court of Appeals, the People raised the same arguments as had been presented to the Appellate Division. By a 4 to 3 vote, the Court of Appeals affirmed the order of the Appellate Division. In a memorandum decision, the majority reasoned that the "defendant's response to the police interrogation occurred while he was in custody, before he had been given the pre-interrogation warnings to which he was constitutionally entitled" and rejected the minority's contention that there was a "sufficiently compelling noninvestigatory purpose" for the question which obviated the necessity for *Miranda* warnings. The full texts of the majority and dissenting opinion appear in the appendix hereto (pp. 6a-14a).

Reasons for Granting the Writ

Introduction

The petitioner argues the following reasons why this petition for writ of *certiorari* should be granted:

1. The decision of the New York Court of Appeals rests solely upon the Constitution of the United States.

2. The issue of whether exigent circumstances can justify the questioning of a person in custody without the benefit of *Miranda* warnings is an extremely substantial federal question which this Court has never decided. While the New York Court of Appeals expressly declined to rule on this question, we submit that its adverse determination of the subsidiary question of whether the likely presence of a gun in a building open to the public such as a supermarket, within a few feet of a defendant who the police have probable cause to believe had just committed an armed felony, constitutes an exigency raises, in itself, a substantial federal question which the Court should determine.

3. The extent to which a violation of *Miranda* requires the exclusion of physical evidence obtained derivatively from a defendant's statement is also a very substantial federal question which has never been decided by this Court. We submit that the position of the New York Court of Appeals on this isue conflicts with the spirit of *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

4. The question of whether physical evidence which would inevitably have been discovered even absent a *Miranda* violation need be suppressed as a fruit of that violation is a third substantial federal issue which has not been decided by this Court.

POINT ONE

The decision rests solely upon the Constitution of the United States.

There are no valid, independent state grounds for the decision reached by the New York Court of Appeals. Therefore, the doctrine expressed in *Jankovich* v. *Toll Road Commission*, 379 U.S. 487 (1965) is not applicable. Further, there is no need to remand this case to the New York Court of Appeals for clarification of its opinion. [*Ohio* v. *Gallagher*, 425 U.S. 257 (1976).] The holding of the New York Court of Appeals that the defendant's statement was elicited without the benefit of "pre-interrogation warnings to which he was constitutionally entitled" was a clear reference to *Miranda* v. *Arizona*, *supra*, and the Fifth Amendment to the United States Constitution. While the People submit that the holding that the *Miranda* warnings are constitutionally required conflicts with *Michigan* v. *Tucker*, *supra*, there can be no doubt that the New York Court of Appeals was basing its decision solely on its interpretation of the Fifth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment.

POINT TWO

The court below improperly held that *Miranda* v. *Arizona*, 384 U.S. 436 (1966) requires pre-interrogation warnings before the questioning of a suspect regarding the location of a gun where the police have probable cause to believe that he had just committed an armed felony and disposed of the gun in the immediate vicinity of where he was standing in a supermarket.

The evidence at the suppression hearing established that Police Officer Kraft had reason to believe that the defendant had committed an armed felony shortly before he encountered him, that the defendant fled upon seeing the officer, that the latter lost sight of him for 15 or 20 seconds, and that, when he finally caught him and frisked him, he found an empty shoulder holster. Under these circumstances, Kraft reasonably believed that there was a gun in the supermarket within a close range of himself, his fellow officers, and the public. To require him to provide *Miranda* warnings to the defendant before asking "where is the gun?" would clearly subject him to unnecessary risk in the performance of his duties. This question was a prudent measure to neutralize the threat of physical harm to anyone in the vicinity which could result from the discovery of the gun by a friend of the defendant, a curious child, or anyone else who, for any reason, might decide to use it. Police should not be discouraged from taking such measures by requiring them to administer *Miranda* warnings before doing so.

This Court has never decided whether exigent circumstances can justify the police in asking a question of a

person in their custody without providing *Miranda* warnings. The Court has made it abundantly clear, however, that exigencies of various sorts can justify the police in conducting searches without a warrant. [See, *e.g.*, *Warden* v. *Hayden*, 387 U.S. 294 (1967) (hot pursuit); *Schmerber* v. *California*, 384 U.S. 757 (1966) (destruction of evidence); *Terry* v. *Ohio*, 391 U.S. 7 (1968); *Adams* v. *Williams*, 407 U.S. 133 (1972); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (danger).] In *Mincey* v. *Arizona*, 437 U.S. 389, 393 (1978), the Court stated that "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." There is no reason why this general rule should not apply equally to asserted violations of the Fifth Amendment as to asserted violations of the Fourth Amendment. The courts of several states have already explicitly done so [*e.g.*, *People* v. *Riddle*, 148 Cal. Rptr. 170 (Cal. Ct. of App. 2d Dist. 1978) *cert. denied* 440 U.S. 937 (1979); *People* v. *Dean*, 114 Cal. Rptr. 555 (Cal. Ct. of App. 4th Dist. 1974); *Pope* v. *State*, 478 P.2d 801 (S.C. Alaska, 1977); *State* v. *Lane*, 467 P.2d 304 (S.C. Wash. 1970)]. The People submit that this Court should also explicitly deal with the issue.

POINT THREE

The court below improperly assumed that physical evidence obtained derivatively from a *Miranda* violation must always be suppressed.

The court below assumed that its finding that there had been a *Miranda* violation required the exclusion of the defendant's gun from evidence. The People submit that the court was incorrect in this assumption.

This Court has never determined the extent to which a *Miranda* violation requires the suppression of physical evidence obtained derivatively therefrom. In *Orozco* v. *Texas*, 394 U.S. 324 (1969), the Court suppressed a statement regarding the location of a gun but made no comment regarding the suppression of the gun itself. In subsequent cases, however, the Court has indicated a willingness to permit the use of evidence derivatively obtained from a *Miranda* violation under certain circumstances. Thus, in *Michigan* v. *Tucker*, *supra*, the Court refused to suppress the testimony of a witness who was discovered because of a statement taken in violation of *Miranda*. [See, also, *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 724 (1975).] *Tucker* explicitly distinguished between a violation of the Fifth Amendment privilege against self-incrimination and a violation of the prophylactic measures suggested in *Miranda* to secure that privilege (417 U.S. at 444), a distinction which the court below failed to recognize. Further, the Court in *Tucker* stated that where the official action which constituted a violation was planned in complete good faith, rather than willfully or negligently, the deterrent rationale of the exclusionary rule loses much of its force (*id.*, at 447).

In the case at bar, there can be no doubt about the good faith of Officer Kraft. Immediately after securing the gun, the officer gave the defendant his *Miranda* warnings. Further, the very fact that 3 out of the 7 judges on the highest court in our state believed that the evidence submitted at the hearing was sufficient to establish a compelling state purpose in securing the gun is an indication that, even if it be determined that Kraft acted improperly, he did not do

so willfully or negligently. Under the circumstances, therefore, the deterrent value of excluding the gun from evidence is far outweighed by the societal cost of letting the defendant go free. [See, *United States* v. *Calandra*, 414 U.S. 338 (1974).]

POINT FOUR

The court below erred in suppressing the defendant's gun because it would inevitably have been discovered even absent the defendant's statement.

Because Officer Kraft knew with a high degree of certainty that the defendant's gun was within the immediate vicinity of the encounter, he undoubtedly would have searched for it in the carton a few feet away from the defendant without the defendant having pointed it out. Accordingly, the People argued, both at the Appellate Division and at the Court of Appeals, that even if, *arguendo*, the suppression of the initial statement be deemed correct, the recovery of the gun was proper under the doctrine of "inevitable discovery."

While this Court recognized the existence of the doctrine of inevitable discovery in *United States* v. *Crews*, 445 U.S. 463, 471 (1980), it has never commented on the validity of it. The validity of the doctrine has, however, been accepted in a number of state courts as well as federal circuit courts. [*People* v. *Fitzpatrick*, 32 N.Y.2d 499 (1973), *cert. denied* 414 U.S. 1033; *People* v. *Brown*, 266 N.E.2d 13 (App. Ct., Ill., 1st Dist. 1970); *United States ex rel. Owen* v. *Twomey*, 508 F.2d 858 (7th Cir. 1974); *United States* v. *Falley*,

489 F.2d 33 (2d Cir. 1973).] The People submit that this Court should clarify the validity of the doctrine and that it should be applied to the case at bar.

Conclusion

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

JOHN J. SANTUCCI
District Attorney
Queens County

STEVEN J. RAPPAPORT
Assistant District Attorney
Of Counsel

82-1213

APPENDIX

Order of the Supreme Court of the State of New York

SUPREME COURT—STATE OF NEW YORK

CRIMINAL TERM, PART 9, QUEENS COUNTY

88-11 Sutphin Boulevard, Jamaica, N. Y.

Present:

HON. NICHOLAS FERRARO, J.S.C.
Justice

Ind. No. 2512/80

Motion: Suppress Statements and Physical Evidence
Hearing March 6, 1981

THE PEOPLE OF THE STATE OF NEW YORK

against

BENJAMIN QUARLES,

Defendant.

HYMAN & MINER, ESQS.
For the Motion
JOHN WALLENSTEIN, A.D.A.
Opposed

The following papers numbered 1 to 3 submitted in this motion

	Papers Numbered
Answering and Reply Affidavits	1–3
Minutes of hearing	3

Upon the foregoing papers THIS MOTION IS GRANTED. SEE MEMORANDUM ON FILE.

GRANTED:

Dated: April 3, 1981

/s/ JOHN J. DURANTE

/s/ N F

Hon. Nicholas Ferraro, J.S.C.

Memorandum Opinion of the Supreme Court, Queens County

SUPREME COURT—QUEENS COUNTY

CRIMINAL TERM, PART 9

By

NICHOLAS FERRARO J.S.C.

Dated: April 13, 1981

Indictment No. 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

BENJAMIN QUARLES,

Defendant.

The defendant, Benjamin Quarles, moves for an order; (1) to suppress certain statements allegedly made by him in violation of his constitutional rights pursuant to CPL section 710.20 (3); (2) to suppress certain physical evidence allegedly seized from him as a result of an unconstitutional search and seizure pursuant to CPL section 710.20(1).

A combination physical evidence suppression (*Mapp*) and *Huntley* hearing was held on March 6, 1981 and the court found the following:

On September 11, 1980 at approximately 12:30 A.M. Police Officer Frank Kraft was the operator of a marked

police car. He and his partner, Officer Sal Scarring, were eastbound on 47th Avenue at Francis Lewis Boulevard when a young woman ran over to the car and asked for assistance. She stated that she had been raped and that the man that did it was a male black, approximately six feet tall wearing a short black jacket with "Big Ben" in yellow letters on the back had gone into an A & P Store on Francis Lewis Boulevard. She also stated the man had a gun. The women [*sic*] was put in the police car and driven near the A & P. Officer Scarring called for back up units as Officer Kraft stood in the doorway of the store and saw the defendant walk toward a check out counter and place groceries on it. The defendant then turned and ran up the aisle toward the back of the store with Officer Kraft in pursuit. Officer Kraft lost sight of the defendant as the defendant turned at the end of the aisle but saw him seconds later two aisles away and told him to stop and put his hands over his head. At that time other police officers surrounded the defendant and Officer Kraft went over to the defendant and frisked him and discovered an empty shoulder holster. Kraft then handcuffed the defendant's hands behind his back. Kraft then asked the defendant where the gun was. The defendant looked in the direction of a stack of cartons and said 'the gun is over there" The gun was not in sight but Kraft reached into a liquid soap carton and found a loaded revolver. He placed the defendant under arrest and read the the proper *Miranda* warnings to him. He then asked the defendant if he owned the gun. The defendant replied "yes" and to the further question of where the gun was bought the defendant responded "Miami, Florida".

The Court after a complete review of the credible evidence finds that the gun and the statement "the gun is over there" must be suppressed.

At the time the defendant was apprehended at least four officers were around the defendant with drawn guns. After the defendant was searched the police handcuffed his hands behind his back. There can be no doubt the defendant was in custody or arrested within the meaning of *Miranda* vs *Arizona*, (86 S. Ct. 1602).

As stated in People v Shivers, (21 NY2d 118)

> "However, once the officer draws his gun, the individual interoggated [*sic*] is actually deprived of his freedom and under *Miranda*, he may no longer be questioned without first being warned of his rights, and any statement elicited without such warnings may not be received in evidence, or otherwise used, at a subsequent trial".

Later cases have held a police officer may ask questions under the Stop and Frisk rule where justified by reasonable suspicion or to protect the officers [*sic*] safety (People v Chestnut 51 NY2d 14; People v Hoffman, 41 NY2d 29). Here the police by handcuffing the defendant had in effect arrested the defendant. He was now entitled to the *Miranda* warnings before any questioning as the police had reasonable cause to arrest and the officers [*sic*] safety was not in question.

The further question of whether to suppress the additional statements by the defendant that he owned the gun and bought it in Miami, Florida after the Miranda warnings were given is a much closer question of law.

Memorandum Opinion of the Supreme Court

The Court finds that the statements made by the defendant after he was given the *Miranda* warnings was [*sic*] tainted by the previous seizure of the weapon and the statement without the warnings. Once the defendant made a prior statement improperly elicited this let "the cat out of the bag" and affected his subsequent statement (United States ex rel Stephen J.B. v Shelly 430 F2d 215, 219). The later statements were made within a period of minutes after the finding of the gun while still in the store and can be called the fruit of the poisonous tree.

Memorandum Opinion of the Court of Appeals, State of New York

COURT OF APPEALS—STATE OF NEW YORK

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

2 No. 615

THE PEOPLE &C.,

Appellant,

v.

BENJAMIN QUARLES,

Respondent.

(615) John J. Santucci, DA, Queens County (Steven J. Rappaport of counsel) for appellant.

Steven J. Hyman & Wayne Brody, NY City, for respondent.

MEMORANDUM.

The order of the Appellate Division should be affirmed.

It was only after defendant had been frisked and his hands handcuffed behind his back that, in consequence of the discovery of an empty shoulder holster, Officer Kraft asked him where the gun was. Pointing to a liquid soap carton several feet away, defendant replied, "The gun is over there." At the time defendant was surrounded by four

police officers whose guns had been returned to their holsters because, as Officer Kraft testified, "the situation was under control". Nothing suggests that any of the officers was by that time concerned for his own physical safety.

Inasmuch as defendant's response to the police interrogation occurred while he was in custody, before he had been given the pre-interrogation warnings to which he was constitutionally entitled, the courts below properly suppressed defendant's statement and the gun which officer Kraft had found on reaching into the liquid soap carton to which defendant had pointed. Similarly, the statements made by defendant only minutes later after he had been given his pre-interrogation warnings were properly suppressed as having been tainted by the seizure of the gun and defendant's pre-warning statement as to its location.

Even if it be assumed that an emergency exception to the normal rule might be recognized if the purpose of the police inquiry had been to locate and to confiscate the gun for the protection of the public as distinguished from their desire to obtain evidence of criminal activity on the part of defendant—a proposition as to which it is not necessary in this case to express an opinion—there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern. Nor, so far as appears from the record, was any such theory advanced by the People at the suppression hearing. Undeniably neither of the courts below, with fact-finding jurisdiction, made any factual determination that the police acted in the interest of public safety.

The two cases on which the dissent would rely are inapposite. In *People v Huffman* (41 NY2d 29) the question was put to the defendant while the police were engaged in a general investigation of possible criminal activity but before they were aware that any crime had been committed and was framed as a threshold inquiry seeking general information only ("What are you doing back here?") rather than calculated to elicit evidence of criminal activity ("Where is the gun?"). In *People v Chestnut* (51 NY2d 14, cert den 449 US 1018) where the defendant's challenge was based primarily on his constitutional right to be free from unreasonable search and seizure under the Fourth Amendment of the Federal Constitution rather than his constitutional right to pre-interrogation warnings, although the defendant and his companion were lying prone on the ground and the officers were standing over them with their guns drawn, the defendant had not been reduced to a condition of physical powerlessness as here, i.e., the situation was not yet "under control", and the police question was found to have been prompted by the officers' concern for their personal safety. We noted that the absence of any constitutionally mandated pre-interrogation warnings did not call for suppression inasmuch as there was no custodial interrogation.

Memorandum Opinion of the Court of Appeals

WACHTLER, J. (dissenting):

In my view, under the circumstances, the police responded to an emergency situation in an entirely reasonable manner and, therefore, suppression of the weapon and defendant's statements cannot be justified on the ground that he was subjected to "custodial interrogation" in violation of his *Miranda* rights.

On September 11, 1980 at approximately 12:30 a.m. Officer Frank Kraft and his partner, Officer Sal Scarring, were on road patrol on 47th Avenue at Francis Lewis Boulevard, Queens, when a young woman approached and requested assistance. She stated that she had just been raped by a man she described as a black male, approximately six feet tall wearing a black jacket with the name "Big Ben" in yellow letters on the back. She indicated that her assailant had entered the nearby A&P supermarket on Francis Lewis Boulevard, and that he had a gun.

The officers drove the woman to the supermarket where Kraft approached the front of the store on foot while Scarring radioed for assistance. Kraft then observed the defendant, who matched the description given by the woman, approaching the checkout counter. Defendant then fled to the rear of the store with Kraft, who lost sight of the defendant for several seconds, in pursuit. Kraft told defendant to stop and put his hands over his head. Other officers who had arrived in the interim surrounded defendant while Kraft frisked him, discovering an empty shoulder holster.

Kraft handcuffed defendant's hands behind his back and asked him where the gun was. The defendant looked in the

direction of a stack of cartons and responded "the gun is over there". The gun was not visible but Kraft reached into one of the cartons and retrieved a loaded revolver. He placed defendant under arrest and advised him of his *Miranda* rights. Kraft then asked defendant if he owned the revolver and received an affirmative reply. In response to another question posed by Kraft defendant indicated that he purchased the weapon in Miami, Florida.

Criminal Term suppressed the statement "the gun is over there" because defendant had not yet been informed of his *Miranda* rights, and also suppressed the revolver and post-arrest statements as tainted evidence (*Wong Sun v United States*, 371 US 471). The Appellate Division affirmed without opinion. In my view neither the letter nor the spirit of the Supreme Court's decision in *Miranda v Arizona* (384 US 436) was violated under these circumstances, and, accordingly, I dissent and vote to reverse.

In *Miranda v Arizona* (384 US 471, *supra*) the Supreme Court held that statements obtained as the result of a custodial interrogation of a defendant may not be used at trial absent some demonstration that procedural safeguards were employed to secure the defendant's privilege against self-incrimination. The court recently interpreted the meaning of the term "interrogation", as used in this context, as including not only express questioning but also its functional equivalent, defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (*Rhode Island v Innis*, 446 US 291, 301).

Memorandum Opinion of the Court of Appeals

Careful analysis of the *Miranda* and *Innis* decisions suggests that the court is primarily concerned with discouraging official conduct which, examined objectively, reveals an unmistakably deliberate attempt to elicit some incriminating response from the detainee as opposed to official conduct designed to achieve an articulable and legitimate noninvestigatory purpose. Neither the Supreme Court nor this Court has ever ruled that a response to a question properly classifiable in the latter category should be suppressed as the product of a custodial "interrogation" in violation of *Miranda's* admonition.

In *People v Huffman* (41 NY2d 29) we held, after determining that defendant was clearly in custody, that the question "what are you doing back there?" directed at a suspect discovered hiding in some shrubbery behind a store at 4 a.m. did not constitute "interrogation" within the meaning of *Miranda*. We determined that the question "was designed to clarify the nature of the situation confronted, rather than to coerce a statement . . . [the officers] had found themselves, quite inadvertently, in the middle of a possible criminal transaction and immediate clarification was necessary before taking drastic action" (41 NY2d, *supra* at p 34).

In *People v Chestnut* (51 NY2d 14) we addressed a factual situation remarkably similar to the instant case. An officer in pursuit of two robbery suspects, at least one of whom was believed armed, observed one pass a small object to the other. After the suspects were apprehended and, while they were lying on the ground with the officer's revolver trained on them, the recipient of the object was asked

"where is the gun?" Citing *Huffman*, we specifically held that none of defendant's Fifth Amendment rights were violated notwithstanding that no *Miranda* warnings were given before the question was posed. We expressed our "opinion that this single question did not constitute custodial interrogation and, thus, the response given by defendant—'It's right here'—need not be suppressed even though defendant was not informed of his constitutional rights before answering" (51 NY2d, supra, at p 23 n 8 [citation omitted]). Since there could be no doubt, after *Huffman*, that defendant was in custody (although not under arrest) the clear import of our holding was that the question was not, under the circumstances, the equivalent of "interrogation" within the meaning of *Miranda*.

Although the officer in *Chestnut* indicated that he believed himself to be in physical danger when he asked the suspect for the weapon, the factual finding by the courts below in this case that the officer's safety was never in question does not require a contrary result. Initially, it is worth noting that nothing in our opinion in *Chestnut* either explicitly or implicitly suggested that our determination that the question was not prescribed [*sic*] by *Miranda* (as opposed to our holding that the question was not an improper stop and frisk under the Fourth Amendment) was based on the officer's perceived threat of physical danger.

More significantly, the danger posed to the general public in this case due to the officers' inability to locate a loaded weapon—a threat which many would perceive to be even more insidious than the threat to the officer's life in *Chestnut*—certainly provides a sufficiently compelling non-investigatory purpose for questioning defendant about the

gun's location without first warning defendant of his *Miranda* rights.[1] Approaching the situation with foresight, as Officer Kraft would have, it is evident that the loaded weapon here could have been passed to a cohort, an accomplice bent on securing the freedom of his captured ally, or, worse yet, dropped on the street outside the supermarket to become the weapon of an innocent child, a mentally unstable adult, or anyone else who might decide to use it. Faced with an obvious emergency requiring an immediate response, Officer Kraft, like the officers in *Huffman*, acted reasonably and, in my view, properly in questioning defendant in a limited manner "designed to clarify the nature of the situation confronted" (41 NY2d *supra*, at p 34).[2]

To require a police officer to provide *Miranda* warnings before asking about the location of a weapon under the circumstances of this case would only unnecessarily enhance the potential for death or severe injury. Far from reveal-

1. In an analogous factual context, the Fifth Circuit Court of Appeals, sitting *en banc*, expressed a similar view: "We find ourselves unable to condemn, after the fact and on grounds of some delicacy, such mild prohylactic measures reasonably calculated to ensure the safety of the officers, the suspect, and others on the scene as well. To be sure, the court below concluded that the agents did not feel physically threatened by Castellana, but in our view the mild measures adopted were justified by a reasonable prudence under the circumstances and did not require an actual fear of imminent harm to validate them" (*United States v Castellana*, 500 F2d 325, 326-327 [footnote omitted]).

2. Nor do we place any significance, as does the majority, in the fact that the police officer's question was not found by the suppression court to have been prompted by the officer's concern for his personal safety or the safety of others. Indeed this is not an appropriate standard to measure the reasonableness of a police officer's conduct in a situation such as this which was fraught with danger. This was our holding in *People v Moore*, (32 NY2d 67): "Then, too, we attach no significance to the fact that at the suppression hearing the arresting officer did not articulate any feeling of fear for his own safety or for the safety of others at the time of the search".

ing a deliberate design on the part of the officer to elicit an incriminating statement from defendant, the record before us portrays a prudent measure undertaken to neutralize the very real threat of possible physical harm which could result from a weapon being at large.[3] Nothing could be more appropriate here than our observant understatement in *Huffman* (41 NY2d, supra, at p 34) that "[t]his was no time for pre-interrogation warnings, or the tender of legal representation".

Miranda was never intended to enable a criminal defendant to thwart official attempts to protect the general public against an imminent, immediate and grave risk of serious physical harm reasonably perceived. Any result which discourages the police from pursuing this type of precautionary measure by requiring *Miranda* warnings beforehand, at the risk of losing the use of all evidence derived thereafter, is contrary to reason and binding precedent.

Accordingly, I respectfully dissent and vote to reverse.

• • •

Order affirmed in a memorandum in which Chief Judge Cooke and Judges Jones, Fuchsberg and Meyer concur. Judge Wachtler dissents and votes to reverse in an opinion in which Judges Jasen and Gabrielli concur.

Decided November 18, 1982

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3. In view of the validity of the first question asked of defendant regarding the location of the gun and the admissibility of his answer, there is no longer a predicate to suppress the revolver. Seizure of the weapon violated no Fourth Amendment right of the accused. Likewise, all of defendant's post-arrest statements are properly admissible, for the questions which elicited those responses were prefaced by the administration of proper *Miranda* warnings.

No. 82-1213

Office Supreme Court, U.S.
FILED
JUL 28 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK,

Petitioner,

against

BENJAMIN QUARLES,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

JOINT APPENDIX

JOHN J. SANTUCCI
District Attorney, Queens County
Attorney for Petitioner
125-01 Queens Boulevard
Kew Gardens, New York 11415
(212) 520-5546

STEVEN J. HYMAN
HYMAN & MINER
Attorneys for Respondent
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New York, New York 10010
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Petition for Certiorari Filed January 17, 1983
Certiorari Granted May 23, 1983

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LIST OF RELEVANT ENTRIES WITH DATES

September 11, 1980: Criminal Court Complaint Lodged

November 24, 1980: Indictment Filed

February 17, 1981: Defendant's Notice of Motion Seeking Suppression, Affidavit of Steven J. Hyman In Support of Defendant's Motion to Suppress, and Affirmation of James Kehoe Answering Defendant's Motion Filed

March 6, 1981: Order and Memorandum of Hon. Sol R. Dunkin Entered and Hearing on Motion to Suppress Held

April 3, 1981: Order and Memorandum Decision of Hon. Nicholas Ferraro Granting Suppression Entered

April 29, 1981: Notice of Appeal and Statement of Insufficiency of Proof in Absence of Reversal Filed

December 7, 1981: Order of Appellate Division Affirming Order Appealed From and Statement of No Opinion Entered

February 11, 1982: Order Granting Leave to Appeal to the Court of Appeals of the State of New York Entered

November 18, 1982: Memorandum Opinion of the Court of Appeals, State of New York Entered

Criminal Court Complaint

CRIMINAL COURT OF THE CITY OF NEW YORK
Part AR 1 County Queens

THE PEOPLE OF THE STATE OF NEW YORK

vs.

BENJAMIN QUARLES,

Defendants.

State of New York)
County of Queens) ss:

PO Kraft Sh#10473 of 111 Precinct being duly sworn, deposes and say that on 9/11/80 at about 12:30 AM at 46-20 Francis Lewis Blvd. (A and P) Queens, State of New York, the defendant committed the offenses of:

A. PL 265.03—Possession of a loaded gun (Armed Felony Offense)

in that said defendants Benjamin Quarles under the following circumstances: Deponent states that at the above time and location, in the County of Queens, the defendant did knowingly and unlawfully possess a loaded gun, in that the deponent was informed by one, Gertha Mosely, that the defendant did have a loaded gun in his possession and upon investigation by the deponent the defendant did in fact have in his possession a loaded gun; to wit .38 caliber revolver (RG40), loaded with six (6) live rounds, serial #RO88942, and the defendant did make the admission to the deponent that he had thrown the said gun into a carton, and the said gun was recovered by the deponent inside the said carton.

9-11-80 /s/ PO FRANK KRAFT
Deponent

Indictment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS

Indictment No. 2312/1980

THE PEOPLE OF THE STATE OF NEW YORK,

against

B. BENJAMIN QUARLES—AFO.VFO

Defendant.

INDICTMENT

COUNTS

CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DECREE

A TRUE BILL

FOREMAN

JOHN SANTUCCI
District Attorney

Indictment

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE COMMITTED AS FOLLOWS:

THE DEFENDANT ON OR ABOUT SEPTEMBER 11, 1980, IN THE COUNTY OF QUEENS, KNOWINGLY AND UNLAWFULLY POSSESSED A LOADED FIREARM, TO WIT: A LOADED .38 CALIBER REVOLVER, SUCH POSSESSION NOT BEING IN THE DEFENDANT'S HOME OF PLACE OF BUSINESS.

THE SUBJECT MATTER OF THIS COUNT BEING AN ARMED FELONY AS THAT TERM IS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW.

JOHN SANTUCCI
District Attorney

Defendant's Notice of Motion Seeking Suppression

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS

Indictment # 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

against

BENJAMIN QUARLES,
Defendant.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the indictment herein and the affidavit of Steven J. Hyman, sworn to the 27th day of January, 1980, the defendant, by his attorneys, Hyman & Miner, will move this court at a Criminal Term, Part 7, Supreme Court, County of Queens, located at the General Courthouse, 88-11 Sutphin Boulevard, Jamaica, N.Y. on the 17th day of February, 1981, at 9:30 a.m. in the forenoon or as soon thereafter as counsel can be heard, for the following relief:

1. For an order pursuant to Article 240.40 of the Criminal Procedure Law granting defendant the complete sub-

stance of the statement alleged to have been made by him to police officer Kraft on September 19, 1980; and

2. For an order pursuant to Section 710.20 of the Criminal Procedure Law suppressing the alleged admission made by defendant to a public servant on September 19, 1980, admitting to possession of a weapon, on the grounds that such admission was involuntary and made in contravention of defendant's constitutional rights; and

3. For an order pursuant to Section 710.20 of the Criminal Procedure Law suppressing the seizure of the weapon which is the subject matter of the indictment herein, on the grounds that such weapon was seized as a result of unlawful and involuntary alleged admissions made by the defendant and was otherwise obtained in contravention of defendant's right under the Fourth and Fifth Amendments of the Constitution of the United States.

4. And for such other and further relief as this court may deem just in the premises.

Dated: January 1981

Yours, etc.,

HYMAN & MINER
Attorneys for defendant
148 East 78th Street
New York, N.Y. 10021
212/737-0400

To: QUEENS COUNTY DISTRICT ATTORNEY
125-01 Queens Boulevard
Kew Gardens, N.Y. 11415

Affidavit of Steven J. Hyman In Support of Defendant's Motion to Suppress

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS

Indictment # 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

against

BENJAMIN QUARLES,
Defendant.

AFFIDAVIT

State of New York)
County of New York) ss.:

STEVEN J. HYMAN, being duly sworn, deposes and says:

1. I am a member of the firm of Hyman & Miner, attorneys for the defendant herein, and submit this affidavit in support of defendant's motion for certain relief pursuant to Section 240.40 of the Criminal Procedure Law and for suppression of certain evidence pursuant to Article 710 of the Criminal Procedure Law.

2. Defendant was indicted in or about December 30, 1980 on a one count indictment charging defendant with

criminal possession of a weapon in the third degree. The indictment is annexed hereto as Exhibit "A".

3. The District Attorney has, pursuant to CPL Section 710.30 served upon defendant, notice that intends to offer a trial a statement to the effect that "the defendant admitted to possession of the gun" which statement was alleged to have been made to a police officer (said notice is annexed hereto as Exhibit "B"). It is submitted that this statement is insufficient for defendant to fully understand the full substance of the alleged admission made by him and it is therefore requested that the District Attorney be required to furnish a more detailed statement of the alleged admission made by defendant.

4. Defendant further moves for a hearing to suppress the weapon and the alleged admission made by defendant in that it is submitted that such evidence was illegally seized in violation of the defendant's constitutional rights.

5. At a preliminary hearing, the police officer herein testified that after placing defendant under arrest and having a weapon pointed at defendant's head, he requested of defendant where the weapon was which is the subject matter of this indictment. At no time, it appears, did the police officer advise defendant of his constitutional rights but instead proceeded to extract admissions from the defendant which are now being used against him. In addition, it appears that this alleged statement made by defendant resulted in the officer seizing the weapon which is the subject matter of the indictment and seeking to place ownership

thereof with the defendant. The seizure of such evidence was, therefore, in violation of defendant's constitutional rights to the extent that it came as a result of an illegally obtained admission.

6. It is therefore submitted that this matter should be set down for a hearing to determine whether or not the admission made by defendant was voluntary and whether the weapon seized thereby was properly obtained under the Constitution of the United States.

WHEREFORE, it is respectfully requested that defendant's motion be, in all respects, granted.

/s/ STEVEN J. HYMAN

STEVEN J. HYMAN

Sworn to before me this
27 day of January, 1981

MARTIN P. MINER
NOTARY PUBLIC, State of New York
No. 30-451-4918
Qualified in Nassau County
Commission Expires March 30, 1981

Affirmation of James Kehoe
Answering Defendant's Motion

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM: QUEENS COUNTY

IND. # 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENJAMIN QUARLES,

Defendant.

State of New York)
County of New York) ss.:

I, James Kehoe, an Assistant District Attorney of Queens County, of counsel to JOHN J. SANTUCCI, DISTRICT ATTORNEY OF QUEENS COUNTY, do hereby affirm the statements herein to be true under the penalties of perjury, except such as are made upon information and belief, which matter I believe to be true.

1. Substance of defense statement is admitting possessing weapon and told arresting officer where it was.

2, 3. Opposed. The motion is base upon the existence on occurrence of facts, and the moving papers do not contain sworn allegation supporting all the essential facts.

4. Acknowledge.

Dated: February 13, 1981
Jamaica, NY

/s/ JAMES KEHOE

Assistant District Attorney

Order and Memorandum of Hon. Sol R. Dunkin

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM, PART 7, QUEENS COUNTY

88-11 Sutphin Boulevard, Jamaica, New York

Present: HONORABLE SOL R. DUNKIN, Justice.

Ind. No. 2512/80

Motion Omnibus

Submitted February 17, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENJAMIN QUARLES,

Defendant.

The following papers numbered 1 to 4 submitted on this motion.

Steven J. Hyman, Esq.
For the Motion

James Kehoe, Esq., A.D.A.
Opposed

	Papers Numbered
Notice of Motion and Affidavits Annexed	1–2
Answering and Reply Affidavits	3
Exhibits	
Minutes—Other	4

Order and Memorandum of Hon. Sol R. Dunkin

Upon the foregoing papers and in the opinion of the Court, defendant's motion is granted in part and denied in part. See accompanying memorandum dated March 6, 1981.

GRANTED:

Date: March 6, 1981

SOL R. DUNKIN, J.S.C.

Order and Memorandum of Hon. Sol R. Dunkin

MEMORANDUM

SUPREME COURT, QUEENS COUNTY

CRIMINAL TERM, PART 7

BY SOL R. DUNKIN, J.

DATED March 6, 1981

Ind. No. 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENJAMIN QUARLES,

Defendant.

The defendant makes this omnibus motion for the following relief:

1. For an order directing the District Attorney to disclose the substance of a statement allegedly made by the defendant.

2. For an order suppressing statements allegedly made by the defendant.

3. For an order suppressing physical evidence.

Order and Memorandum of Hon. Sol R. Dunkin

The first branch of the defendant's motion is granted to the extent of the response in the District Attorney's answering affirmation.

The second and third branches of the defendant's motion are granted to the extent that pre-trial *Huntley* and *Mapp* hearings are ordered.

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of this decision to the attorney for the defendant and to the District Attorney.

SOL R. DUNKIN, J.S.C.

Hearing on Motion to Suppress

SUPREME COURT: QUEENS COUNTY

TRIAL TERM, PART 9

Indictment 2512-80

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENJAMIN QUARLES,

Defendant.

General Courthouse
88-11 Sutphin Boulevard
Jamaica, New York 11435
March 6, 1981

HEARING

Before:

THE HONORABLE NICHOLAS FERRARO, *Justice.*

APPEARANCES:

FOR THE PEOPLE:

JOHN J. SANTUCCI, ESQ.
Queens District Attorney
BY: JOHN WALLENSTEIN, ESQ.
Assistant District Attorney

FOR THE DEFENDANT:

STEVEN HYMAN, ESQ.

GLORIA SEELEY
Official Court Reporter

Hearing on Motion to Suppress

The Clerk: Added to the Part 9 calendar, indictment 2512-80, Benjamin Quarles. Are you Benjamin Quarles?

Defendant: Yes, I am.

Mr. Hyman: Steven Hyman of the firm of Hyman and Myer, Manhattan.

The Clerk: Mr. Quarles is Mr. Steven Hyman here your attorney?

Defendant: Yes.

The Clerk: This case was transferred from Judge Dunkin's part forthwith for Mapp and Huntley Hearing.

The Court: Call your witness Mr. Wallenstein.

Mr. Hyman: May I have my associate sit with me?

The Court: Yes. Would you call the police officer, please.

Police Officer FRANK KRAFT, Shield 10473, New York City Police Department, 111th Precinct, called as a witness by and on behalf of the People, being duly sworn, testified as follows:

The Court: Mr. Wallenstein.

Direct Examination by Mr. Wallenstein:

Q. Officer Kraft, I direct your attention to September 11, 1980 in the vicinity of 46-20 Francis Lewis Boulevard in Queens County. Were you present and on duty at that location at that time?

A. I was, sir.

Q. And, did you have occasion at that time to arrest the defendant, Benjamin Quarles?

A. I did, sir.

Q. Would you tell us the events leading up to that arrest?

A. On the day in question I was the operator of the department vehicle, and we were eastbound on 47th Avenue at Francis Lewis Boulevard when a young lady came running down the street and asked my assistance, that she had been raped.

Mr. Hyman: Objection.
The Court: It's a hearing, counselor.
Mr. Hyman: Excuse me.
The Court: It's a hearing.
Mr. Hyman: Yes, I understand that, Judge.
The Court: I'll permit it.

Q. What did she say to you?

A. She told me that there was a man in the A&P that had a gun, that had taken her in an automobile to that location.

Q. And, did she give you a description of that man?

A. She did.

Q. What description did she give?

A. She told me there was a man in the A&P, male black, approximately 6 feet and he was wearing a short black jacket and in the back of the jacket was marked "Big Ben" in yellow letters.

Q. And—

The Court: Big Ben?
The Witness: Big Ben.

Q. And, what did you do at that time?

A. I proceeded to the front of the store and I observed the inside of the store. I observed the defendant coming —walking between the aisles to the check-out counter.

Q. And, would you give us a description of the person you saw at that time?

A. The perpetrator, a male black.

Q. What did he look like?

A. Male black, six foot, walking to the check-out counter with a few groceries in his hands, and he had the jacket on, and on the jacket was marked "Big Ben."

Q. What did you do at that time?

A. At that time, we waited. We thought maybe the perpetrator would come out of the store. When the perpetrator observed me standing in the doorway he ran from the checkout counter between the aisles to the rear of the store.

Q. What did you do?

A. I gave chase.

Q. What happened next?

A. When I reached the end of the aisle, I told the defendant to stop, placed his hands above his head, which he did, and I approached the defendant, and I frisked him.

Q. What did you find when you frisked him?

A. Under his jacket he was wearing a brown leather shoulder holster which was empty.

Q. What happened then?

A. And, I asked the defendant where the gun was.

Q. What did he say?

A. He pointed and told me it was in the carton to his right, approximately four feet from where he was standing.

Q. What kind of a carton was that?

A. Cartons piled on the floor, approximately—maybe six feet high of cartons containing liquid soap.

Q. Did you look in that carton?

A. I did.

Q. What did you find?

A. A loaded revolver.

The Court: What kind of a revolver?

The Wtiness: Thirty-eight.

Q. What did you do at that time?

A. I then placed the defendant under arrest and we took him into the station house.

Q. Now, at the scene, did you ask him any further questions?

A. After I advised him of his rights, I did.

Q. What rights did you advise him of, Officer?

A. He had the right to remain silent, and so on and so forth.

The Court: Not so on and so forth, what did you say to him, and—what did you say to him?

Mr. Hyman: Excuse me, your Honor, I did not hear the first question. The question—

The Court: (Int'g) Please read it back.

Mr. Hyman: As to—prior to when he gave the rights, that last statement.

(Whereupon, the reporter read the requested testimony.)

Q. Officer, when you advised him of his rights, did you read them from something?

A. I did, sir.

Q. What did you read them from?

A. I carry this calendar in my leather jacket at all times on the back of it, is the rights.

Q. This piece of paper?

A. Yes, sir.

Mr. Wallenstein: May I have this deemed marked?

The Court: Show it to co-counsel.

Mr. Wallenstein: People's I for identification at this time.

(Whereupon, the item referred to is received and deemed People's I for identification)

Q. Officer, this piece of paper which I have in my hands, which is deemed marked People's Exhibit I for identification, is this the paper that you read from at that time?

A. The exact one, sir.

Q. The exact one? And, did you read this verbatim?

A. Yes, sir.

Mr. Wallenstein: Your Honor I offer it in evidence.

The Court: Deemed marked in evidence as People's I.

(Whereupon, the item referred to previously deemed People's I for identification is received and (deemed) People's I in evidence:)

Q. Now, Officer, using People's I, Officer, we're going to hold that for a few minutes. There are questions on that piece of paper. Did he respond to each of those questions?

A. He did, sir.

Q. Would you read us the way you did at that time, would you read us the question you asked him and tell us what his response was?

A. The light is not too good here. So, I would need my glasses to read this.

Q. Do you have them?

A. I do.

The Witness: Can I get my glasses, your Honor?
The Court: Surely.
The Witness: Want me to continue?
Mr. Wallenstein: Yes, sir.

A. (Cont'g) "You have the right to remain silent and refuse to answer any questions; do you understand?" He replied that he did. "Anything that you say may be used against you in a court of law; do you understand?" And, he shook his head on that one.

Q. Yes or no?

A. Yes. "You have the right to counsel and attorney before speaking to the police and have—" the light is very poor here, "and have an attorney present during the questions and in the future, do you understand?" And, he said he did. "If you cannot afford an attorney one will be supplied to you without cost; do you understand?" Just looked at me. No answer on that one.

Q. Okay.

A. "If you do have an attorney available, you have the right to remain silent until you have one—an opportunity to consult with one; do you understand?" No answer, no remarks whatsoever. "Now that you have been advised of

your rights, are you willing to answer any questions without an attorney present?''

Q. What did he say?

A. He said, yes.

Q. Now, after you advised him of his rights, what did he say to you and —what did he say to you?

A. I asked him did he own the gun.

Q. What did he say?

A. He did.

Q. What?

The Court: What did he say?
The Witness: He did.
The Court: He said he did.
The Witness: He said he owned the gun.
The Court: What was his words?

Q. What were his exact words?

A. I said to him, do you own a gun, and he said he did.

Q. You say he did or did he say I—

A. He did, that I can recall. He did.

Q. Did you ask him anything else?

A. I asked him where he bought it.

Q. What did he say?

A. Miami, Florida.

Q. Did you have any further conversation with him at that time?

A. No, sir.

Q. You then took him back to the 111th Precinct; is that correct.

A. Yes, sir.

Q. At the precinct did you have any conversation with him?

A. No, sir.

Q. You took his pedigree for the arrest report; is that right?

A. At Central Booking.

Q. In addition to his pedigree, did he make any other statements to you?

A. No, sir.

Q. Now, Officer, the individual who you've described as the perpetrator, the person with the gun that you arrested that day, do you see him in this courtroom?

A. Yes, sir.

Q. Could you point him out, please?

A. Yes, sir. He's there, right there with the grey.

Mr. Hyman: Pointing to the defendant, your Honor.

The Court: Indicating the defendant, thank you.

Mr. Wallenstein: Your Honor, I would ask that the gun be deemed marked in evidence for the purpose of the hearing.

Mr. Hyman: No objection, your Honor.

The Court: Fine, deemed marked People's II in evidence.

(Whereupon, the item referred to is received and deemed People's II in evidence.)

Cross Examination by Mr. Hyman:

Q. Officer Kraft, how long had you been on duty that night in question, sir?

A. Approximately 45 minutes, sir.

Q. And, who—were you alone in your patrol car, sir?

A. No, sir.

Q. Was there another officer with you?

A. Yes, sir.

Q. What was that officer's name?

A. The officer is Police Officer Sal Scarring. [phon]

Q. And, is Police Officer Sal Scarring on the force today?

A. No, sir.

Q. Do you know where he's located?

A. Somewhere in Florida.

Q. Now, you say you were approached by a woman; is that correct?

A. That's true.

Q. Had you ever seen this woman before?

A. No, sir.

Q. And, she indicated to you that the defendant was in the store and had a gun; is that what she said?

A. She told me, yes, sir.

Q. And, what did you then do after speaking with the —this woman? What did you next do?

A. The exact movement you want, sir?

Q. Well, as best you can recall, Officer. After you had a conversation with this woman, I presume at the patrol car; is that correct?

A. That's right. I placed her inside of the patrol car and proceeded to the front of the store, which is approximately—

Q. Put her in the police car?

A. Right. And, I proceeded to go to the front of the A&P which is approximately a quarter way up the block, north of where I was stopped.

Q. Now, is this a shopping center, sir?

A. No, it's just a large A&P with a parking area in the front of it.

Q. And, what did you then do?

A. Next? After she gave me a description of the perpetrator, I left the R.M.P. and stood in front of the doorway of the store.

Q. Now, she gave you—did you write down the description?

A. No, sir.

Q. And, you're saying she gave you a description of a black man who was 6 foot, who had a jacket on; is that it?

A. Yes, sir.

Q. And, where was your car parked in relation to the front of the store?

A. Approximately two car lengths from—approximately about 40 feet from the entrance of the store.

Q. And, you then left your vehicle?

A. Yes, sir.

Q. At that time, had you called in at all with respect to this event?

A. I did, my partner did, sir.

Q. Had you asked for any assistance at that time?

A. My partner had informed C.U. that we were at this location and that we were looking for a perpetrator with a gun.

Q. Does that mean, sir, that other patrol cars will be responding?

A. Yes.

Q. Did, in fact, other patrol cars respond?

A. Yes, sir.

Q. By the time you entered the store, how many other patrol cars were there?

A. I have no idea, sir.

Q. Was there more than one?

A. Yes, sir.

Q. So far as you understood, by the time you went to the store, there were at least four police officers in the vicinity, possibly more—that is, in the vicinity of the store?

A. I would say so, yes, sir.

Q. And, you then are standing—prior to entering the store, you say you stand in front of the door, is that it, sir?

A. I was standing at the doorway of the store.

Q. And, what do you observe?

A. Looking into the store at the moment that I came to the front door, all I could observe was a clerk who was at one of the check-out counters approximately 35. 40 feet from where I was standing.

Q. Were there any other people that you observed at that time?

A. No, sir.

Q. And, then what transpired?

A. Then, I observed the defendant walking, coming between the aisles to the check-out counter.

Q. Now, how many aisles, if you recall, sir, were there in this supermarket that you could observe?

A. I don't understand your question.

Q. How many numbers?

A. It was quite a few, sir.

Q. Was he coming out of a middle aisle, an end or—

A. Approximately seven check-outs from where I was standing.

Q. And, what did you observe him do next?

A. He came to the check-out counter, he placed a few groceries on the counter and—

Q. (Int'g) Was he facing you at this time?

A. Yes, sir.

Q. And, when he came out of the aisle, was he facing you?

A. No, sir.

Q. Was he walking backward?

A. No—he would come out of the aisle, he was facing east and I was standing North—that the doorway to the store is on the northside of the store.

Q. So, when you first seen him, how was he in relation to you? Are you seeing his front, his back, his side, what are you seeing?

A. I'm seeing his side, and his front, from the angle where I was standing.

Q. All right. I'm trying to visualize east and north, Officer. I'm having a tough time of it.

Mr. Hyman: Your Honor, may I have one moment?

The Court: Yes.

What did you give him?

Mr. Wallenstein: I gave him the Grand Jury minutes.

Mr. Hyman: Rosario.

Thank you, your Honor.

Q. Mr. Kraft, you observed the front and you say side of the individual. Was he then walking away from you when you first see Mr. Quarles?

A. He's not—he's walking toward me.

Q. And, when he approached the counter, he put down the groceries?

A. Yes, sir.

Q. Is he also walking toward you at that time, that is, is he facing you?

A. Oh, yes.

Q. So, you're looking directly at the check-out counter at that point?

A. I'm looking directly in the perpetrator's face.

Q. At any time between the time you first saw him and the time you observed him at the check-out counter, had he turned around, turned his back to you?

A. I can't recall.

Q. Now, when you see him after he's at the check-out counter, how long by the way has this now taken from the time you got to the A&P to the time you've seen him, Mr. Quarles, as you say, at the check-out counter with the groceries, time-wise, sir?

A. From the time that the female informant came up to me?

Q. Or the time you were at the A&P, whatever is easier for you.

A. Approximately five minutes.

The Court: From when to when?

The witness: From the time that the informant told me that the perpetrator had a gun.

Q. How long if you can tell me, Officer Kraft, do you think you were outside the store before you went inside the

store—that is had arrived at the store and watching for an individual, saw Mr. Quarles and then went into the store?

A. I don't think—less than two minutes or so.

Q. And, what happens now when you see Mr. Quarles at the check-out counter? You say something else transpired with regard to Mr. Quarles? What does he do?

A. He turns around and runs up the aisle away from the check-out counter.

The Court: Toward the rear of the store?
The Witness: Toward the rear of the store.

Q. Does he say anything to you?

A. No, sir.

Q. Now, what then do you do, sir?

A. I ran right after the defendant up the same aisle that he had proceeded to the rear of the store.

Q. And, do you have your weapon at this point?

A. Pardon me, sir?

Q. Do you have your weapon at the point that you enter the store?

A. Yes, sir.

Q. And, at the time you're running up the aisles, do you have your weapon?

A. Yes, sir.

Q. And, do you have your weapon drawn?

A. Yes, sir.

Q. And, is your partner with you?

A. Do you mean in the same aisle?

Q. In the store, let's say.

A. He's in the store, yes, sir.

Q. Do you know if any other officers are in the store at that point?

A. There are.

Q. Do you know how many?

A. No, sir.

Q. Now, your partner runs up an aisle as well; is that it? Another aisle?

A. Yes, sir.

Q. Do you see him again before you see Mr. Quarles?

A. No, sir.

Q. When you see Mr. Quarles, is your partner, does your partner come on the scene rather quickly?

A. Rather quickly, yes.

Q. And, do the other police officers come on the scene rather quickly?

A. Rather quickly.

Q. Now, you follow Mr. Quarles, you say, up the aisle?

A. Yes, sir.

Q. What then happens?

A. When Mr. Quarles reaches the end of the aisle, he makes a right turn, which I lose sight of him for approximately, whatever, and I make a turn and there is—two aisles away, there is Mr. Quarles standing there.

Q. So, he's standing now in an aisle, and you see him in the aisle. Is he still running?

A. No, he's slowing down, let's put it that way—stopped.

Q. Slowing to a stop, and when you see him slow to a stop, he's in the aisle?

A. Right.

Q. And, you have him in complete visual contact at that point?

A. Yes, sir.

Q. How long do you think you lose sight of him for? Time-wise?

A. Fifteen seconds, 20 seconds.

Q. To turn a corner 15, 20 seconds? You're running after him?

A. Right.

Q. He makes a turn, how far are you from him when you're running up the aisle?

The Court: How far from him are you when you lose sight of him, is that what you mean?

Mr. Hyman: First, your Honor, let's establish how far he was when you first run into the store and run after Mr. Quarles.

Q. How far are you initially and do you close the gap?

A. About ten yards or so.

The Court: Ten yards—30 feet?

The Witness: About 30 feet.

Q. And, do you, before Mr. Quarles turns the corner, close the gap?

A. Somewhat.

Q. And, you then turn the corner right after he does, right?

A. Approximately.

Q. And, when you see him again, how far away is he from you at that point?

A. Another 30 feet, approximately 30 feet away from me.

Q. Now, is this in a lighted store?

A. Yes, sir.

Q. And, you now see him at again 30 feet away or so. What do you then do when you see him turn the corner?

The Court: You mean after he turned the corner?
Mr. Hyman: Yes.
The Court: After he turned the corner.

A. After I turned the corner, when I observed the defendant, I told him to stop, put his hands over his head.

Q. And, what did the defendant do?

A. He did as such.

Q. Now, are these the first words you've spoken to the defendant?

A. Yes, sir.

Q. At that time, do other police officers come on the scene where you are?

A. Yes, sir.

Q. How many other officers now converge at that point?

A. I don't recall the number.

Q. More than three?

A. Yes, sir.

Q. Do they surround in essence, Mr. Quarles?

A. In essence, yes, sir.

Q. Do they all have their weapons drawn?

A. I can't recall that.

Q. You had your weapon drawn?

A. Yes, sir.

Q. Did your partner have his weapon drawn?

A. Yes, sir.

Q. Did you then approach Mr. Quarles?

A. I did.

Q. Were you the first one to reach Mr. Quarles, or did any of the other police officers arrive there ahead of you in direct proximity to him? If you recall.

A. My recollection is I reached the defendant before any other police officers did.

Q. Now, at the time you reached the defendant, how are his hands?

A. In the air now.

Q. And, is he facing you directly?

A. Partially.

Q. Is he facing any other police officers?

A. I can't recall that.

Q. What then do you say if anything to Mr. Quarles?

A. I moved right next to the defendant. I holstered my revolver. I moved right next to the defendant and I frisked him. I tossed him.

Q. Did you at that time say anything to him?

A. Not until after I got done with the frisk.

Q. Now, the other police officers, what were they doing at that time, if you recall?

A. Just standing there.

Q. At that point do you recall how many officers there were?

A. No, sir.

Q. Now, when you say you frisked him, what did you do, physically?

A. I was face to face with the defendant and I took my hands and I came down his clothing, his body, and when

I reached underneath his shoulder, I opened up—I could feel something. I could open his jacket up, his jacket was unzipped and I placed it apart further and I seen the strap of a shoulder holster.

Q. And, then did you continue to frisk him?

A. I went right into the shoulder holster for the gun.

Q. And, did you continue to frisk the rest of the defendant?

A. I did.

Q. At this time, as you were frisking him, the other officers were there with their weapons still drawn, were they not?

A. I don't recall that.

Q. At the point now you completed the frisk. What did you physically do with respect to the defendant? Did you move him? Did you place him against the wall? Did you handcuff him?

A. I handcuffed him in the rear.

Q. So, now his hands were behind him?

A. Yes, sir.

Q. Had you at that moment placed him under arrest?

A. Did I inform him he was under arrest at that time?

Q. Yes.

A. I can't say I had.

Q. Now, after you have him handcuffed, what next happens with respect to you and Mr. Quarles?

A. I asked the defendant where the gun was.

Q. Had you had any other conversation with him prior to that question and after you had said to him, "Halt, put your hands in the air," or "stop" or words to that effect?

A. I don't recall any conversation.

Q. How long now after you had frisked him, handcuffed him did it take—let me withdraw that question.

Let me rephrase it differently. What was the time period between the time that you approached Mr. Quarles and frisked him to the time that you handcuffed him?

A. A matter of minutes.

Q. And, at that point, sir, how long was it until you asked him any questions after you handcuffed him, do you recall?

A. Took me probably less than a minute to frisk him. When I didn't come up with the gun is when I asked him where—when I started to question him.

Q. When you say you had handcuffed him and then questioned him, had you moved him physically anywhere or was he still standing in the same spot?

A. Approximately the same spot he was stopped at.

Q. Had you turned him around in any way?

A. Yes.

Q. Now, when you asked him where the gun was were other police officers present?

A. Yes, sir.

Q. And, what did the defendant say to you at this time now?

A. He pointed to where the gun was.

Q. He has these handcuffs, so he's not pointing.

A. Excuse me. He looked in the direction where the gun was and told me it was in the carton.

Q. What were the words he said to you, if you recall?

A. The exact words?

Q. To the best of your recollection.

A. "The gun is over there."

Q. Now, at the time that he made this statement did anyone have a weapon on him that you recall? That is, did other police officers still have or—were there weapons drawn, pointed at the defendant?

A. Not that I could recall, no, sir.

Q. Is it possible or not that you—or you can't answer the question?

A. I don't believe that anybody had their gun drawn after the perpetrator was handcuffed.

Q. Because the situation was under control?

A. Definitely, sir.

Q. Now, when he says the gun is—does he identify the carton that it's in?

A. No.

Q. Now, you also indicated that he indicated he was looking at an area. When you looked at that area, did you see any weapon in sight?

A. No, sir.

Q. And, you then went over and took the weapon out of the carton; is that it?

A. A cardboard carton, yes, sir.

Q. Was it behind it, was it in it?

A. The cartons were cardboard, they were—containing large bottles of liquid soap. The carton was cut on the top, the bottom was removed. I reached my hand into the carton and I came out with a loaded revolver.

Q. At the point that you obtained that weapon, and after the point that you had handcuffed the defendant, the only words I gather you said to him was where was the gun?

A. "Where is the gun?"

Q. Now, after you take the defendant—or—do you then after you have the gun question the defendant further?

A. All I said is that he was under arrest.

Q. So that's the time you use the words under arrest?

A. I says, "You're under arrest."

Q. And, is it at that point that you pull out that little slip of paper?

A. Approximately right at that time, yes, sir.

Q. And, is it that little slip of paper that you read before, was the same slip you read from then?

A. Yes, that's the one.

Q. Would you put your glasses on then, Officer?

The Court: He asked you did you put them on?

The Witness: Oh, did I put them on—no, sir.

Mr. Hyman: No further questions, your Honor.

The Court: Thank you, Officer. (Whereupon, the witness leaves the stand.)

Mr. Wallenstein: The People's case.

Mr. Hyman: Defendant's case, your Honor.

The Court: Defendant rests?

Mr. Hyman: Yes.

The Court: People rest?

Mr. Wallenstein: Yes.

The Court: Yes, counselor?

Mr. Hyman: Your Honor, I'm actually going to ask the court for a little time to submit a memorandum.

The Court: I'll reserve my decision, counselor.

Mr. Hyman: The reason being, your Honor, I think that we are at—I believe in view of the statement as to how this arrest, and the request for the gun came about that it violated the defendant's rights with re-

spect to Miranda, that he was not advised of his rights at the appropriate time and that the inculpatory statement of the gun is there—is, of course, the most critical.

So, if the statement falls, then so does the gun, and therefor—

The Court: (Int'g) How much time do you need, couselor?

Mr. Hyman: Your Honor, I would ask for a week, if that will be convenient to the court.

The Court: Well, minutes ordered. How much time do you want to submit the memorandum?

Mr. Hyman: Two weeks, your Honor. Give me a week after that, your Honor.

Mr. Wallenstein: Judge, I may or may not want to put in a memorandum depending on what Mr. Hyman has to say.

The Court: I want the memorandum within the three weeks, counselor.

Mr. Hyman: Fine, your Honor.

The Court: Then, I'll put the matter over for decision until April 9, counselor. I expect to have your memorandum in much before that.

Mr. Hyman: I will, your Honor.

The Court: Defendant is on bail. You have the memorandum to me within a week.

Mr. Hyman: I'll order the minutes.

The Court: Then, I should have your memorandum by the 23rd, the week of the 23rd.

Mr. Hyman: That is correct, your Honor. No later than let us say—as long as I have the minutes by March 20th, your Honor, you'll have my memorandum.

The Court: I want it no later than the 25th. You'll have it before the 20th, the minutes. The matter is adjourned to April 9; is that satisfactory?

Mr. Hyman: Yes, it is, your Honor.

Hearing on Motion to Suppress

The Court: Bail continued. Counselor, I've given you the opportunity to submit the memorandum and so forth, but for the record, you should make a motion.

Mr. Hyman: Okay. At this time, your Honor, under the evidence given, I believe that the defendant's constitutional rights were violated and that the weapon produced—introduced into evidence and the statements elicited by the officers are deprivations of his rights and should be suppressed.

The Court: Fine. Decision reserved.

(Whereupon, the case is adjourned to Thursday, April 9, 1981 at 9:30 a.m.)

* * *

This is to certify that the foregoing is a true and accurate transcription of the original stenographic record.

/s/ GLORIA SEELEY

Official Court Reporter

Order and Memorandum Decision of Hon. Nicholas Ferraro Granting Suppression

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM, PART 9 QUEENS COUNTY

88-11 Sutphin Boulevard, Jamaica, New York

Present:

HON. NICHOLAS FERRARO, J.S.C.
Justice.

Ind. No. 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENJAMIN QUARLES,

Defendant.

Motion

SUPPRESS STATEMENTS AND PHYSICAL EVIDENCE

Hearing March 6, 1981

The following papers numbered 1 to 3 submitted in this motion.

HYMAN & MINER, ESQS.
For the Motion

JOHN WALLENSTEIN, A.D.A.
Opposed

Order and Memorandum Decision of
Hon. Nicholas Ferraro Granting Suppression

	Papers Numbered
Notice of Motion and Affidavits	
Answering and Reply Affidavits	1–2
Exhibits	
Minutes of hearing	3

Upon the foregoing papers, THIS MOTION IS GRANTED. SEE MEMORANDUM ON FILE.

GRANTED:
Date: April 2, 1981
John J. Durante

/s/ N. F.

J.S.C.
HON. NICHOLAS FERRARO

Order and Memorandum Decision of Hon. Nicholas Ferraro Granting Suppression

MEMORANDUM

SUPREME COURT QUEENS COUNTY

CRIMINAL TERM, Part 9

BY NICHOLAS FERRARO, J.S.C.

Dated April 3, 1981

Indictment No. 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

BENJAMIN QUARLES,

Defendant.

The defendant, Benjamin Quarles, moves for an order; (1) to suppress certain statements allegedly made by him in violation of his constitutional rights pursuant to CPL section 710.20 (3); (2) to suppress certain physical evidence allegedly seized from him as a result of an unconstitutional search and seizure pursuant to CPL section 710.20(1).

A combination physical evidence suppression (*Mapp*) and *Huntley* hearing was held on March 6, 1981 and the court found the following:

On September 11, 1980 at approximately 12:30 A.M. Police Officer Frank Kraft was the operator of a marked

police car. He and his partner, Officer Sal Scarring, were eastbound on 47th Avenue at Francis Lewis Boulevard when a young woman ran over to the car and asked for assistance. She stated that she had been raped and that the man that did it was a male black, approximately six feet tall wearing a short black jacket with "Big Ben" in yellow letters on the back had gone into an A & P store on Francis Lewis Boulevard. She also stated the man had a gun. The woman was put in the police car and driven near the A & P. Officer Scarring called for back up units as Officer Kraft stood in the doorway of the store and saw the defendant walk toward a check out counter and place groceries on it. The defendant then turned and ran up the aisle toward the back of the store with Officer Kraft in pursuit. Officer Kraft lost sight of the defendant as the defendant turned at the end of the aisle but saw him seconds later two aisles away and told him to stop and put his hands over his head. At that time other police officers surrounded the defendant and Officer Kraft went over to the defendant and frisked him and discovered an empty shoulder holster. Kraft then handcuffed the defendant's hands behind his back. Kraft then asked the defendant where the gun was. The defendant looked in the direction of a stack of cartons and said "the gun is over there". The gun was not in sight but Kraft reached into a liquid soap carton and found a loaded revolver. He placed the defendant under arrest and read the proper *Miranda* warnings to him. He then asked the defendant if he owned the gun, the defendant replied "yes" and to the further question of where the gun was bought the defendant responded "Miami, Florida".

Order and Memorandum Decision of
Hon. Nicholas Ferraro Granting Suppression

The Court after a complete review of the credible evidence finds that the gun and the statement "the gun is over there" must be suppressed.

At the time the defendant was apprehended at least four officers were around the defendant with drawn guns. After the defendant was searched the police handcuffed his hands behind his back. There can be no doubt the defendant was in custody or arrested within the meaning of *Miranda* vs. *Arizona*, (86 S.Ct. 1602).

As stated in People v. Shivers, (21 NY2d 118)

> "However, once the officer draws his gun, the individual interrogated is actually deprived of his freedon and under *Miranda*, he may no longer be questioned without first being warned of his rights, and any statement elicited without such warnings may not be received in evidence, or otherwise used, at a subsequent trial".

Later cases have held a police officer may ask questions under the Stop and Frisk rule where justified by reasonable suspicion or to protect the officers safety (People v. Chestnut 51 NY2d 14; People v. Hoffman, 41 NY2d 29). Here the police by handcuffing the defendant had in affect arrested the defendant. He was now entitled to the *Miranda* warnings before any questioning as the police had reasonable cause to arrest and the officers safety was not in question.

The further question of whether to suppress the additional statements by the defendant that he owned the gun and bought it in Miami, Florida after the Miranda warnings were given is a much closer question of law.

The Court finds that the statements made by the defendant after he was given the *Miranda* warnings was tainted

by the previous seizure of the weapon and the statement without the warnings. Once the defendant made a prior statement improperly elicited this let "the cat out of the bag" and affected his subsequent statement (United States ex rel Stephen J.B. v. Shelly 430 F2d 215, 219). The later statements were made within a period of minutes after the finding of the gun while still in the store and can be called the fruit of the poisonous tree.

Based on the foregoing and the totality of circumstances the court will suppress the statements that the defendant owned the gun and brought it in Miami, Florida.

Order entered accordingly.

The Clerk of court is directed to mail a copy of this decision and the order to be entered thereon to the attorney for the defendant and the District Attorney.

/s/ N. F.

Nicholas Ferraro, J.S.C.

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM : COUNTY OF QUEENS

Indictment No. 2512-80

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

BENJAMIN QUARLES,

Defendant-Respondent.

NOTICE OF APPEAL

SIR:

PLEASE TAKE NOTICE that the People of the State of New York hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, pursuant to § 450.20, subd. 8, of the Criminal Procedure Law from that part of an order entered April 3, 1981, suppressing, after a hearing, the use of physical

evidence and statements, and from each and every part of said order as well as from the whole thereof.

Dated: Kew Gardens, New York
April 29, 1981

Yours, etc.

JOHN J. SANTUCCI
District Attorney
Queens County
125-01 Queens Boulevard
Kew Gardens, N.Y. 11415
(212) 520-2092

To:

Hon. JOHN J. DURANTE
County Clerk, Supreme Court
88-11 Sutphin Boulevard
Jamaica, New York 11435

HYMAN & MINER, Esqs.
Attorneys for Defendant-Respondent
148 East 78th Street
New York, New York 10021

Statement

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM : COUNTY OF QUEENS

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

BENJAMIN QUARLES,

Defendant-Respondent.

STATEMENT

1. The undersigned, on behalf of the People of the State of New York, has taken an appeal from that part of an order of the Criminal Term of the Supreme Court, Queens County, entered April 3, 1981, suppressing, after a hearing, the use of physical evidence and statements.

2. In the undersigned's opinion the deprivation of the use of evidence suppressed has rendered the sum of the proof available to the People with respect to the indictment herein insufficient as a matter of law.

JOHN J. SANTUCCI
District Attorney
Queens County

By WILLIAM SCHRAGER

Dated: Kew Gardens, N.Y.
April 29, 1981

Order of Appellate Division Affirming Order Appealed From

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on December 7, 1981

HON. VINCENT D. DAMIANI, *Justice Presiding,*
HON. VITO J. TITONE,
HON. GUY J. MANGANO,
HON. DAVID T. GIBBONS,
Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

v.

BENJAMIN QUARLES,
Respondent.

ORDER ON APPEAL FROM ORDER

IT the above entitled cause, the above named The People of the State of New York, plaintiff, having appealed to this court from an order of the Supreme Court, Queens County, dated April 3, 1981; and the said appeal having been argued by Steven J. Rappaport, Esq., of counsel for the appellant, and argued by Steven J. Hyman, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon the court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Statement of No Opinion By the Appellate Division

VINCENT D. DAMIANI, J.P.
VITO J. TITONE
GUY J. MANGANO
DAVID T. GIBBONS, JJ.

—— AD2d —— A—November 9, 1981

2205 E

(Ind. No. 2512-80)

THE PEOPLE, etc.,

Appellant,

v.

BENJAMIN QUARLES,

Respondent.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (Steven J. Rappaport of counsel), for appellant.

Hyman & Miner, New York, N.Y. (Steven J. Hyman of counsel; Wayne Brody on the brief), for respondent.

Order of the Supreme Court, Queens County (FERRARO, J.), dated April 3, 1981, affirmed. No opinion.

DAMIANI, J.P., TITONE, MANGANO and GIBBONS, JJ., concur.

Order Granting Leave to Appeal to the Court of Appeals of the State of New York

STATE OF NEW YORK COURT OF APPEALS

BEFORE:

HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

BENJAMIN QUARLES,

ORDER GRANTING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at Albany, New York
February 11, 1982

SOL WACHTLER

Associate Judge

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* Description of Order: Order of Supreme Court, Criminal Term, Queens, April 3, 1981, suppressing statements and physical evidence; affirmed by Appellate Division, Second Department, December 7, 1981.

Memorandum Opinion of the Court of Appeals, State of New York

COURT OF APPEALS—STATE OF NEW YORK

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

2 No. 615

THE PEOPLE &c.,

Appellant,

v.

BENJAMIN QUARLES,

Respondent.

(615) John J. Santucci, DA, Queens County (Steven J. Rappaport of counsel) for appellant.

Steven J. Hyman & Wayne Brody, NY City, for respondent.

MEMORANDUM.

The order of the Appellate Division should be affirmed.

It was only after defendant had been frisked and his hands handcuffed behind his back that, in consequence of the discovery of an empty shoulder holster, Officer Kraft asked him where the gun was. Pointing to a liquid soap carton several feet away, defendant replied, "The gun is over there." At the time defendant was surrounded by four police offiicers whose guns had been returned to their hol-

sters because, as Officer Kraft testified, "the situation was under control". Nothing suggests that any of the officers was by that time concerned for his own physical safety.

Inasmuch as defendant's response to the police interrogation occurred while he was in custody, before he had been given the pre-interrogation warnings to which he was constitutionally entitled, the courts below properly suppressed defendant's statement and the gun which officer Kraft had found on reaching into the liquid soap carton to which defendant had pointed. Similarly, the statements made by defendant only minutes later after he had been given his pre-interrogation warnings were properly suppressed as having been tained by the seizure of the gun and defendant's pre-warning statement as to its location.

Even if it be assumed that an emergency exception to the normal rule might be recognized if the purpose of the police inquiry had been to locate and to confiscate the gun for the protection of the public as distinguished from their desire to obtain evidence of criminal activity on the part of defendant—a proposition as to which it is not nescessary in this case to express an opinion—there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern. Nor, so far as appears from the record, was any such theory advanced by the People at the suppression hearing. Undeniably neither of the courts below, with fact-finding jurisdiction, made any factual determination that the police acted in the interest of public safety.

The two cases on which the dissent would rely are inapposite. In *People v Huffman* (41 NY2d 29) the question was put to the defendant while the police were engaged in a general investigation of possible criminal activity but before they were aware that any crime had been committed and was framed as a threshold inquiry seeking general information only ("What are you doing back here?") rather than calculated to elicit evidence of criminal activity ("Where is the gun?"). In *People v Chestnut* (51 NY2d 14, cert den 449 US 1018) where the defendant's challenge was based primarily on his constitutional right to be free from unreasonable search and seizure under the Fourth Amendment of the Federal Constitution rather than his constitutional right to pre-interrogation warnings, although the defendant and his companion were lying prone on the ground and the officers were standing over them with their guns drawn, the defendant had not been reduced to a condition of physical powerlessness as here, i.e., the situation was not yet "under control", and the police question was found to have been prompted by the officers' concern for their personal safety. We noted that the absence of any constitutionally mandated pre-interrogation warnings did not call for suppression inasmuch as there was no custodial interrogation.

Memorandum Opinion of the Court of Appeals

WACHTLER, J. (dissenting):

In my view, under the circumstances, the police responded to an emergency situation in an entirely reasonable manner and, therefore, suppression of the weapon and defendant's statements cannot be justified on the ground that he was subjected to "custodial interrogation" in violation of his *Miranda* rights.

On September 11, 1980 at approximately 12:30 a.m. Officer Frank Kraft and his partner, Officer Sal Scarring, were on road patrol on 47th Avenue at Francis Lewis Boulevard, Queens, when a young woman approached and requested assistance. She stated that she had just been raped by a man she described as a black male, approximately six feet tall wearing a black jacket with the name "Big Ben" in yellow letters on the back. She indicated that her assailant had entered the nearby A&P supermarket on Francis Lewis Boulevard, and that he had a gun.

The officers drove the woman to the supermarket where Kraft approached the front of the store on foot while Scarring radioed for assistance. Kraft then observed the defendant, who matched the description given by the woman, approaching the checkout counter. Defendant then fled to the rear of the store with Kraft, who lost sight of the defendant for several seconds, in pursuit. Kraft told defendant to stop and put his hands over his head. Other officers who had arrived in the interim surrounded defendant while Kraft frisked him, discovering an empty shoulder holster.

Kraft handcuffed defendant's hands behind his back and asked him where the gun was. The defendant looked in the

direction of a stack of cartons and responded "the gun is over there". The gun was not visible but Kraft reached into one of the cartons and retrieved a loaded revolver. He placed defendant under arrest and advised him of his *Miranda* rights. Kraft then asked defendant if he owned the revolver and received an affirmative reply. In response to another question posed by Kraft defendant indicated that he purchased the weapon in Miami, Florida.

Criminal Term suppressed the statement "the gun is over there" because defendant had not yet been informed of his *Miranda* rights, and also suppressed the revolver and post-arrest statements as tainted evidence (*Wong Sun v United States*, 371 US 471). The Appellate Division affirmed without opinion. In my view neither the letter nor the spirit of the Supreme Court's decision in *Miranda v Arizona* (384 US 436) was violated under these circumstances, and, accordingly, I dissent and vote to reverse.

In *Miranda v Arizona* (384 US 471, *supra*) the Supreme Court held that statements obtained as the result of a custodial interrogation of a defendant may not be used at trial absent some demonstation that procedural safeguards were employed to secure the defendant's privilege against self-incrimination. The court recently interpreted the meaning of the term "interrogation", as used in this context, as including not only express questioning but also its functional equivalent, defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (*Rhode Island v Innis*, 446 US 291, 301).

Careful analysis of the *Miranda* and *Innis* decisions suggests that the court is primarily concerned with discouraging official conduct which, examined objectively, reveals an unmistakably deliberate attempt to elicit some incriminating response from the detainee as opposed to official conduct designed to achieve an articulable and legitimate noninvestigatory purpose. Neither the Supreme Court nor this Court has ever ruled that a response to a question properly classifiable in the latter category should be suppressed as the product of a custodial "interrogation" in violation of *Miranda's* admonition.

In *People v Huffman* (41 NY2d 29) we held, after determining that defendant was clearly in custody, that the question "what are you doing back there?" directed at a suspect discovered hiding in some shrubbery behind a store at 4 a.m. did not constitute "interrogation" within the meaning of *Miranda*. We determined that the question "was designed to clarify the nature of the situation confronted, rather than to coerce a statement . . . [the officers] had found themselves, quite inadvertently, in the middle of a possible criminal transaction and immediate clarification was necessary before taking drastic action" (41 NY2d, *supra* at p. 34).

In *People v Chestnut* (51 NY2d 14) we addressed a factual situation remarkably similar to the instant case. An officer in pursuit of two robbery suspects, at least one of whom was believed armed, observed one pass a small object to the other. After the suspects were apprehended and, while they were lying on the ground with the officer's revolver trained on them, the recipient of the object was asked

"where is the gun?" Citing *Huffman*, we specifically held that none of defendant's Fifth Amendment rights were violated notwithstanding that no *Miranda* warnings were given before the question was posed. We expressed our "opinion that this single question did not constitute custodial interrogation and, thus, the response given by defendant—'It's right here'—need not be suppressed even though defendant was not informed of his constitutional rights before answering" (51 NY2d, supra, at p 23 n 8 [citation omitted]). Since there could be no doubt, after *Huffman*, that defendant was in custody (although not under arrest) the clear import of our holding was that the question was not, under the circumstances, the equivalent of "interrogation" within the meaning of *Miranda*.

Although the officer in *Chestnut* indicated that he believed himself to be in physical danger when he asked the suspect for the weapon, the factual finding by the courts below in this case that the officer's safety was never in question does not require a contrary result. Initially, it is worth noting that nothing in our opinion in *Chestnut* either explicitly or implicitly suggested that our determination that the question was not prescribed [sic] by *Miranda* (as opposed to our holding that the question was not an improper stop and frisk under the Fourth Amendment) was based on the officer's perceived threat of physical danger.

More significantly, the danger posed to the general public in this case due to the officers' inability to locate a loaded weapon—a threat which many would perceive to be even more insidious than the threat to the officer's life in *Chestnut*—certainly provides a sufficiently compelling non-investigatory purpose for questioning defendant about the

gun's location without first warning defendant of his *Miranda* rights.[1] Approaching the situation with foresight, as Officer Kraft would have, it is evident that the loaded weapon here could have been passed to a cohort, an accomplice bent on securing the freedom of his captured ally, or, worse yet, dropped on the street outside the supermarket to become the weapon of an innocent child, a mentally unstable adult, or anyone else who might decide to use it. Faced with an obvious emergency requiring an immediate response, Officer Kraft, like the officers in *Huffman*, acted reasonably and, in my view, properly in questioning defendant in a limited manner "designed to clarify the nature of the situation confronted" (41 NY2d *supra, at* p 34).[2]

To require a police officer to provide *Miranda* warnings before asking about the location of a weapon under the circumstances of this case would only unnecessarily enhance the potential for death or severe injury. Far from reveal-

1. In an analogous factual context, the Fifth Circuit Court of Appeals, sitting *en banc*, expressed a similar view: "We find ourselves unable to condemn, after the fact and on grounds of some delicacy, such mild prophylactic measures reasonably calculated to ensure the safety of the officers, the suspect, and others on the scene as well. Te be sure, the court below concluded that the agents did not feel physically threatened by Castellana, but in our view the mild measures adopted were justified by a reasonable prudence under the circumstances and did not require an actual fear of imminent harm to validate them" (*United States v Castellana*, 500 F2d 325, 326-327 [footnote omitted]).

2. Nor do we place any significance, as does the majority, in the fact that the police officer's question was not found by the suppression court to have been prompted by the officer's concern for his personal safety or the safety of others. Indeed this is not an appropriate standard to measure the reasonableness of a police officer's conduct in a situation such as this which was fraught with danger. This was our holding in *People v Moore*, (32 NY2d 67): "Then, too, we attach no significance to the fact that at the suppression hearing the arresting officer did not articulate any feeling of fear for his own safety or for the safety of others at the time of the search".

ing a deliberate design on the part of the officer to elicit an incriminating statement from defendant, the record before us portrays a prudent measure undertaken to neutralize the very real threat of possible physical harm which could result from a weapon being at large.[3] Nothing could be more appropriate here than our observant understatement in *Huffman* (41 NY2d, supra, at p 34) that "[t]his was no time for pre-interrogation warnings, or the tender of legal representation".

Miranda was never intended to enable a criminal defendant to thwart official attempts to protect the general public against an imminent, immediate and grave risk of serious physical harm reasonably perceived. Any result which discourages the police from pursuing this type of precautionary measure by requiring *Miranda* warnings beforehand, at the risk of losing the use of all evidence derived thereafter, is contrary to reason and binding precedent.

Accordingly, I respectfully dissent and vote to reverse.

• • •

Order affirmed in a memorandum in which Chief Judge Cooke and Judges Jones, Fuchsberg and Meyer concur. Judge Wachtler dissents and votes to reverse in an opinion in which Judges Jasen and Gabrielli concur.

Decided November 18, 1982

3. In view of the validity of the first question asked of defendant regarding the location of the gun and the admissibility of his answer, there is no longer a predicate to suppress the revolver. Seizure of the weapon violated no Fourth Amendment right of the accused. Likewise, all of defendant's post-arrest statements are properly admissible, for the questions which elicited those responses were prefaced by the administration of proper *Miranda* warnings.

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In The

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

BENJAMIN QUARLES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE
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No.

THE PEOPLE OF THE STATE OF NEW YORK,

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-against-

BENJAMIN QUARLES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

QUESTIONS PRESENTED

1. Whether the New York Court of Appeals correctly found that the

defendant-respondent was entitled to pre-interrogation warnings under Miranda v Arizona after he had been arrested and handcuffed and before being asked "Where is the gun?", where the arresting officers had no concern for their safety and there appeared no other exigent circumstances on the record?.

2. Whether the New York Court of Appeals correctly found that the weapon seized solely as a result of defendant's statement obtained in violation of his rights under Miranda v Arizona should be suppressed.

3. Whether the petitioner may argue that the gun would have been "inevitably discovered" when, under New York law, it failed to preserve the issue in the trial court.

STATEMENT OF CASE

The questions presented in this case arise out of the custodial interrogation of the defendant-respondent on September 11, 1980. The following facts were

adduced from the uncontroverted testimony of the arresting officer at the suppression hearing:

At 12:30 a.m. on the 11th of September, 1980, the officer and his partner were on radio patrol when they were approached by the complainant, who they had not seen before (TR:13)*. The complainant told the officers that she had been raped (TR:3). She described the perpetrator, said that he had a gun and that he was in a nearby supermarket (TR:4).

Putting the complainant in the patrol car, the officers drove to the store and informed the precinct that they were in search of an armed perpetrator at that location

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*All references in the statement of facts are to the original transcript.

(TR:14). At least two patrol cars came to their assistance and there were at least six officers on the scene before the arresting officer entered the store (TR:15).

The officer testified that he, at first, observed only the clerk and then saw the defendant as he walked up one of the store's center aisles (TR:15-16).

The defendant then turned and ran back up the aisle toward the rear of the store (TR:19). The officers immediately gave chase (id).

The defendant, at the end of the aisle, somewhat less than thirty feet anead of the officer, turned the corner and was out of his view for a brief period of time (TR:21). When the arresting officer turned that corner he again had the defendant in view and "told him to stop, put his hands over his head." (TR:23).

At that point, at least four officers converged on the scene, surrounding the defendant (id). At least two of them had their weapons drawn (TR:24).

The defendant stood still, hands raised, surrounded by police with drawn weapons. The arresting officer "moved right next to the defendant", holstered his revolver, and frisked him, without saying a word (id).

On conducting a thorough frisk of the defendant, the officer discovered an empty shoulder holster, and nothing more (TR:25). After the frisk was completed, the defendant's hands were cuffed behind his back.

At the point that the defendant was handcuffed, none of the officers had their weapons drawn. According to the arresting officer, they had the situation "definitely" under control (TR:28).

Speaking for the first time since he had ordered the defendant to halt, the officer "then asked the defendant where the gun was" (TR:27). Looking in the direction of a stack of cartons the defendant replied "the gun is over there" (TR:28). The officer went over to the stack, reached his hand into the carton indicated and

"found a gun" (id).

The officer said to the defendant "You're under arrest". He then read him the Miranda warnings from a pre-printed paper (TR:29). As to each of the four warnings the defendant was asked whether he understood. The defendant replied he did understand as to both the right to remain silent and the right to have counsel present. The defendant merely shook his head (yes) in response to whether or not he understood that his statements might be used against him, and made no response at all to the question as to whether or not he understood the right to have an attorney provided if he could not afford one (TR:9).

When asked whether or not he understood that if he had an attorney available he could remain silent until able to consult with him the defendant gave "no answer, no remarks whatever", but he answered "yes" to the question "are you willing to answer any questions without an attorney

present?" (id).

The officer then asked the defendant whether he owned the gun, and the defendant said he did. To the officer's question of where the gun was bought, the defendant responded "Miami, Florida". No further questioning occurred beyond that necessary for the defendant's booking (TR:11).

ARGUMENT

POINT I

THE NEW YORK COURT OF APPEALS CORRECTLY DETERMINED THAT THE GUN AND STATEMENTS OBTAINED AS A RESULT OF CUSTODIAL INTERROGATION OF THE RESPONDENT PRIOR TO HIS RECEIPT OF MIRANDA WARNINGS WERE PROPERLY SUPPRESSED

The New York Court of Appeals determined that Respondent was entitled to pre-interrogation Miranda warnings once he had been placed under

arrest and had been frisked and handcuffed and before police questioning as to the location of a weapon. While the People argue that exigent circumstances can justify the police in asking for the location of a weapon even after a prisoner is in custody but before providing Miranda warnings, neither the record nor any relevant case law supports the application of any such exception in this case.

The record of the suppression hearing reveals that the police officers were not concerned with their safety when they interrogated the respondent as to the location of a weapon. The arresting officer testified that the situation was "definitely" under control and that all the other officers on the scene had holstered their weapons at the time of the interrogation. No other person was said to be in the immediate vicinity nor was there any claim that respondent had any confederate nearby.

The trial court specifically found that safety was not a factor at the time that respondent was asked about the weapon (A:4a *. The Appellate Division affirmed the findings of the trial court without modifying the facts found by the lower court. The Court of Appeals consistent with the findings of fact, held that:

> There is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern. Nor so far as appears from the record, was any such theory advanced by the People at the suppression hearing. Undeniably, neither of the courts below, with fact finding jurisdiction, made any factual determination that the police acted in the interest of public safety. at (A:7a).

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* All "A" references are to the appendix filed with the petition for a writ of certiorari.

Under the record presented to this Court, it is therefore clear that the question asked of respondent before he was read his rights was "custodial interrogation" as defined by this Court in Miranda and Rhode Island v Innis, 446 U.S.291 (1981). Such interrogation should have been preceded by the Miranda warning.

Petitioner argues that it is necessary for this Court to establish an exception to the Miranda rule where exigent circumstances are presented. Numerous courts, including the New York Court of Appeals, have recognized that where the situation is not in control, and poses a threat to the safety of the officers, the officers need not immediately proffer the Miranda warnings before taking the steps necessary to secure the situation. Thus, in People v Chestnut, 51 NY2d 14 (1980), cert. den. 499 U.S. 1018 (1981), the Court of Appeals permitted the question "Where is the gun?" when the record

demonstrated that there was a substantial basis for the officers to be concerned for their welfare and safety and, as the court noted in distinguishing the instant case, "the situation was not yet under control (A:8a)". The Chestnut decision is in accord with similar cases from other jurisdictions and Federal courts as cited on page 9 of the petition. See also, U.S. v Castellana, 500 F.2d 325 (5th Circ. 1974) and U.S. v Ganter, 436 F.2d 364 (7th Circ. 1970).

The suppression of the statements and the gun in this case has been upheld by the New York courts not, as petitioner contends, because of an inadequate rule of law, but because the record herein does not establish the existence of any "exigent circumstances", in the form of a threat to the safety of the officers' or the public, or otherwise.

The petitioner's argument that certiorari should be granted so that this court can decide whether "exigent

circumstances" can justify the police in asking a question of a person in their custody without providing Miranda warnings" is unavailing in the absence of any such circumstances.

POINT II

THE GUN WAS PROPERLY SUPPRESSED AS "TAINTED FRUIT"

The gun which was seized in this case was obtained solely as a result of the confession obtained from respondent in violation of his rights under Miranda. Under such circumstances, the Court of Appeals correctly held that the gun should be suppressed. Wong Sun v U.S., 371 U.S. 471 (1963).

The theory of Michigan v Tucker, 417 U.S. 433 (1974), upon which the petitioner relies, is inapplicable to the case at bar. In Tucker, the Court found that police interrogation, which took place prior to the Court's

decision in Miranda was correct under the then existing standard established in Escobedo v Illinois, 378 U.S.478 (1964). The Court then found that the violation involved had been merely technical, and that the police had, in fact, complied with the constitutional safeguards then required (See Tucker at pp. 446-448).

In the instant case, however, no warnings were given respondent until after he had been asked the question, given his answer and the gun located. This was not merely a failure to provide respondent with the exact formulation required under Miranda. Rather it was a total failure to accord respondent any warnings prior to an undeniably custodial interrogation. Under such circumstances, the exclusionary rule applies to both the confession and the fruits derived therefrom. See U.S. v Downing, 665 F.2d 404 (First Cir. 1981).

As respondent argues and the New York courts have held, respondent was enitled to have been advised of his rights under Miranda prior to being asked the question "Where is the gun?" The gun which was obtained in violation of such constituional rights must be suppressed. Michigan v Tucker does not mandate a different result.

POINT III

THE PETITIONER HAS NOT PRESERVED THE ISSUE OF "INEVITABLE DISCOVERY" FOR APPEAL

The petitioner argues in this court that the gun should not have been suppressed since it would have "inevitably" been discovered even absent the respondent's statement. However, this issue was not preserved below.

The People never advanced any such argument in the trial court and, under the well-established law of the State of New York, the issue was not

preserved for appeal. See People v Tutt, 38 N.Y.2d 1011 (1976); People v Martin. 50 N.Y.2d 1029 (1980). The contention as to inevitable discovery was raised for the first time in the Appellate Division, which affirmed the original decision without opinion. When the issue was raised in the Court of Appeals it was ignored by both the majority and dissent.

Having failed to raise the issue in the appropriate court, it is submitted that the issue cannot be raised at this time for this court.

CONCLUSION

For the reasons set forth above, the respondent herein submits that a writ of certiorari should not be granted in this case.

Respectfully submitted

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NEW YORK,

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against

BENJAMIN QUARLES,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PETITIONER

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Questions Presented

1. Whether the Court of Appeals of the State of New York properly excluded the defendant's statement, "The gun is over there," as being elicited in violation of his federal constitutional rights where the police had probable cause to believe that he had just committed an armed felony and disposed of the gun in the immediate vicinity of where he was standing in a supermarket.

2. Assuming, *arguendo*, that question one is to be answered in the affirmative, whether the Court of Appeals of the State of New York properly excluded the defendant's gun, which was recovered from a carton a few feet from the defendant, and his later admissions of ownership thereof as fruits of the constitutional violation.

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No. 82-1213

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK,

Petitioner,

against

BENJAMIN QUARLES,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals of New York, reported at 58 N.Y.2d 664, 458 N.Y.S.2d 520, 444 N.E.2d 984, appears in the appendix hereto (pp. 51a-59a).*

* Numerical references are to pages of the joint appendix.

Jurisdiction

The decision of the Court of Appeals of the State of New York was entered on November 18, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

The petition for a writ of certiorari was filed on January 17, 1983, and certiorari was granted on May 23, 1983. An extension of time in which to file the brief of the petitioner on the merits and the appendix was granted, thereby extending the time in which to file the brief and appendix to and including August 6, 1983.

Constitutional Provisions Invoked

FIFTH AMENDMENT

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

FOURTEENTH AMENDMENT

Section 1 ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Statement of the Case

Introduction

Acting upon apparently reliable information given to him by a woman who claimed to have been raped at gunpoint, a police officer found a man, the defendant, who precisely fitted this victim's description, at the precise place

designated by her, namely a supermarket. Apprehending the defendant, who was carrying an empty shoulder holster, after chasing him through the store, the officer (without giving any *Miranda* warnings) asked him where the gun was. The defendant indicated a carton a few feet away, and the officer there recovered a loaded revolver. As a result, the defendant was indicted for criminal possession of a weapon in the third degree.

Upon a motion to suppress both evidence of the defendant's statement about the revolver's location and the gun itself, a hearing was held upon both phases of the motion. The motion was granted in all respects by an order suppressing both the gun and the declaration, accompanied by an opinion.

Upon an appeal by the People to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, that order was affirmed without opinion. On appeal, by leave, to the Court of Appeals of the State of New York, the order of the Appellate Division, Second Judicial Department, was affirmed by a 4 to 3 decision.

The Evidence

On September 11, 1980, Police Officer **Frank Kraft** and his partner, Officer **Sal Scarring**, were in uniform and driving their patrol car eastbound on 47th Avenue and Francis Lewis Boulevard in Queens County, New York City, when they were approached by a young woman who stated that she had been taken to that location and raped by a man with a gun. Asking for the officers' assistance, she de-

scribed the rapist as a black man, approximately six feet tall, wearing a short black jacket with "Big Ben" in yellow letters on the back, and declared that he had gone into the A & P store on Francis Lewis Boulevard (16a-23a).

Kraft drove the woman to the front of the store which was about a quarter of a block north of the point where he had stopped (17a-23a). As Officer Scarring called for assistance, Kraft went to the front of the store (17a-24a). There, he saw the defendant—who matched the description given by the woman—approaching the checkout counter (17a).

Upon Kraft's appearance in the doorway, the defendant fled from the checkout counter to the rear of the store (17a-28a). Kraft gave chase, lost sight of the defendant for 15 or 20 seconds, overtook him, and told him to stop and put his hands over his head (17a, 28a-31a). As other police officers were arriving on the scene, Kraft frisked the defendant, discovering an empty shoulder holster, and then handcuffed his hands behind his back and asked him where the gun was (12a, 32a-33a). The defendant looked in the direction of a carton approximately four feet away and said, "the gun is over there" (12a, 18a, 34a-35a).

Kraft reached in the carton and found a loaded revolver —the subject of the *Mapp* phase of this motion (18a, 35a). He then informed the defendant that he was under arrest, read the *Miranda* warnings to him and asked him if he owned the gun, to which the defendant replied in the affirmative (18a, 21a, 36a). Kraft then asked where he had purchased it and the defendant said, "Miami, Florida" (21a).

The Decision on the Hearing

By order dated April 3, 1981, the hearing court granted the defendant's motion to suppress statements and physical evidence. In a memorandum decision accompanying the order, the hearing court stated that the defendant was "entitled to the *Miranda* warnings before any questioning as the police had reasonable cause to arrest and the officers' safety was not in question." A copy of the hearing court's order and memorandum decision appears in the joint appendix (39a-44a).

The Appeal to the Appellate Division

Upon appeal to the Appellate Division of the State Supreme Court, Second Judicial Department, the People contended that the single question, "where is the gun" did not constitute interrogation under *Miranda* v. *Arizona*, 384 U.S. 436 (1966) because it was a prudent protective measure attendant to the defendant's arrest and custody and that, even were the declaration of the defendant concerning the location of the gun to be deemed improperly obtained, the gun itself need not have been suppressed because it would inevitably have been discovered, even absent the statement. The Appellate Division, however, unanimously affirmed the hearing court's order without opinion. The order and statement of no opinion, reported at 85 A.D.2d 966, appear in the appendix hereto (48a-49a).

The Appeal to the New York Court of Appeals

On appeal, by leave, to the New York Court of Appeals, the People raised the same arguments as had been presented to the Appellate Division. By a 4 to 3 vote, the

Court of Appeals affirmed the order of the Appellate Division. In a memorandum decision, the majority reasoned that the "defendant's reponse to the police interrogation occurred while he was in custody, before he had been given the pre-interrogation warnings to which he was constitutionally entitled," and rejected the dissent's contention that there was a "sufficiently compelling noninvestigatory purpose" for the question which obviated the necessity for *Miranda* warnings. The full texts of the majority and dissenting opinions appear in the appendix hereto (pp. 51a-59a).

Summary of Argument

The precise issues to be determined in this case are (1) whether the defendant's statement, "The gun is over there," must be suppressed as having been elicited in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and (2) if so, whether the revolver itself and the defendant's admission of ownership regarding it, elicited after proper *Miranda* warnings were administered, must be suppressed as fruits of the initial violation.

Because Police Officer Kraft had probable cause to believe that the defendant had just committed an armed felony and disposed of a gun in the immediate vicinity where he was standing in a supermarket, the single question "where is the gun?" which elicited the declaration regarding the location of the weapon, was a prudent protective measure, designed to neutralize the threat of physical harm to anyone in the vicinity and was not proscribed by *Miranda*. While this Court has never determined the cir-

cumstances under which express questions asked of a person in custody without the benefit of *Miranda* warnings may be permissible, numerous state and lower federal courts have held that some such questions are not proscribed. In particular, questions concerning the location of weapons in the immediate vicinity have generally been held to be reasonble. Just as exigencies of various sorts can justify the police in conducting searches without a warrant, exigent circumstances, such as the likely presence of a gun in the immediate vicinity of an arrest for an armed felony in a supermarket, can justify the police in questioning a suspect in a limited manner without administering *Miranda* warnings, for the purpose of eliminating those circumstances. Since the actions of Officer Kraft were not blameworthy, there is no reason to suppress the evidence obtained as a result of those actions.

Even if the defendant's statement, "The gun is over there," be deemed to have been elicited in violation of *Miranda*, the revolver itself, and the subsequent declarations concerning it, need not be suppressed as fruits of this violation. In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), this Court held that a violation of the prophylactic rules of Miranda which were designed to protect the Fifth Amendment right against self-incrimination is not necessarily a violation of the Fifth Amendment itself. Thus, while a statement elicited in violation of *Miranda* must be suppressed on the authority of *Miranda*, evidence obtained derivatively therefrom is not *per se* inadmissible (417 U.S. at 446). Rather, the nature of the particular violation must be balanced against the interest in making relevant, trustworthy evidence available to the trier of fact (417 U.S. at 450). In the case at bar, even if it be determined

that Officer Kraft acted improperly, there can be no doubt that he did so in good faith and not willfully or negligently. His single question was directed to the location of the gun and, as soon as the gun was secured, he issued *Miranda* warnings to the defendant. Under the circumstances, the deterrent value of excluding the gun from evidence is far outweighed by the societal cost of letting the defendant go free.

Even if Officer Kraft's actions be deemed so flagrant a violation of *Miranda* as to constitute a violation of the Fifth Amendment as well, however, the defendant's revolver and subsequent declaration of ownership thereof need not be suppressed because they would inevitably have been discovered absent his initial statement. Snce the police knew with a high degree of certainty that there was a gun in the immediate vicinity of where the defendant was standing in the supermarket, there can be no serious doubt that they would have looked in the carton four feet away without the defendant having looked in its direction and declared that "the gun is over there." Having secured the gun without the defendant's declaration, they would have followed the same procedures with regard to *Miranda* warnings and subsequent questioning as they did after securing it with his statement. Since the initial declaration was not, therefore, the sine qua non of the discovery of the gun and of the subsequent statements, the defendant is not entitled to suppression of them as "fruits" of the alleged violation.

POINT ONE

The Defendant's Declaration Concerning the Location of His Revolver Was Properly Elicited and Evidence Thereof Should Not Be Suppressed.

The evidence adduced at the suppression hearing established that Police Officer Frank Kraft had compelling reasons to believe that a man whom he found in a supermarket, namely the defendant, had just committed a rape at gunpoint; that, upon seeing the uniformed officer, the defendant fled to the rear of the store; that Kraft pursued, captured and frisked him there, discovering an empty shoulder holster on his person; that, after handcuffing him, Kraft immediately asked him where the gun was; that the defendant, looking in the direction of a carton a few feet away, declared that it was "over there"; and that Kraft then retrieved a loaded revolver from the carton. Under these circumstances, the single question, "where is the gun?" was a prudent protective measure attendant to defendant's arrest and custody and, thus, did not constitute interrogation within the meaning of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), or require the so-called *Miranda* warnings.

In *Miranda* v. *Arizona, supra,* this Court held that prosecutors may not use statements stemming from custodial interrogation of a defendant unless they demonstrate the use of procedural safeguards to secure the privilege against self-incrimination. The Court suggested that, prior to any custodial interrogation by a law enforcement officer, a defendant should be advised that he has the right to remain silent, that anything he says can be used against

him, that he has the right to consult with an attorney and to have an attorney present during the interrogation, and that, if he cannot afford an attorney, one will be appointed to represent him. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (384 U.S. at 444), and distinguished this from "general on the scene questioning as to facts surrounding a crime" (*Id.* at 477).

In each of the four cases decided by the *Miranda* opinion, "law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession." (*Id.* at 440). Each defendant was questioned "in a room in which he was cut off from the outside world . . . incommunicado" (*Id.* at 445). In explaining the need for pre-interrogation warnings, the Court discussed the prevalence of "police brutality—beatings, hangings, whipping"—as well as "sustained and protracted questioning incommunicado in order to extort confessions" (*Id.* at 446); and it cited interrogation manuals stressing that the major qualities which an interrogator should have are patience and perseverance (*Id.* at 450). Concern was expressed that confessions so extorted might be false and that reliance on them might make law enforcement officials less zealous in searching for objective evidence (*Id.* at 447).

The case at bar exhibits none of the evils which the *Miranda* opinion was designed to eradicate. Rather, the defendant was asked a single question, in a public place, for the protection of everyone in the vicinity, and this

question led to objective evidence (the gun) which was itself corroborative of the defendant's statement. Since, then, the circumstances which gave rise to *Miranda* are not present in the instant case, the warnings designed to eliminate, or mitigate, those circumstances were not necessary.

There can be little doubt that when the police surrounded and handcuffed the defendant he was in custody within the meaning of *Miranda* [*Orozco* v. *Texas*, 394 U.S. 324, 327 (1969)]. To characterize the single question asked him as an "interrogation," however, is to stretch the meaning of that word beyond all usefulness. Indeed, within three months of the *Miranda* opinion, one commentator pointed out that "not all questions, isolated questions, associated, you might say, as the res gestae of the arrest or perhaps in the booking process at the station are covered by the limitation on interrogation." [Professor Louis B. Schwartz, "Criminal Justice in the Mid-Sixties: Escobedo Revisited," *Proceedings of the Twenty-Ninth Annual Judicial Conference Third Judicial Circuit of the United States*, September 8, 1966 (42 F.R.D. 437, 467).]

This Court, however, did not define the term "interrogation" for purposes of *Miranda* until *Rhode Island* v. *Innis*, 446 U.S. 291 (1980). Specifically, *Innis* held that, in addition to express questions, the term "interrogation" under *Miranda* encompasses the "functional equivalent" of express questioning, which was defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect (446 U.S. at 301).

If the *Innis* standard for determining what constitutes the "functional equivalent" of express questioning were to be applied to the express question asked in the case at bar, that question should not be considered interrogation; a question about the location of a weapon must be considered "normally attendant to arrest and custody" in any situation in which a police officer has reason to believe that a suspect is armed or has recently disposed of the weapon in such a manner as to prove a threat to the police or other individuals at the scene. In *United States* v. *Bennett*, 626 F.2d 1309, 1313 (5th Cir. 1980), *cert. denied*, 449 U.S. 1092 (1981), it was held that the statement of one police officer to the other that "there's a gun in the car" did not constitute interrogation because "those words and actions, which are necessary or appropriate to inform fellow officers of a potential threat to their own safety and that of others in the course of an arrest or custody are normally attendant." Moreover, the court stressed that this was so regardless of whether the defendant had been restrained at the time, a matter which was the subject of dispute, "as even restrained suspects have been known to escape." There is no reason why this reasoning should not apply equally to a question, such as the one asked of the defendant in the case at bar, which is necessary and appropriate to removal of a potential threat.

More fundamentally, however, the plain language of *Innis* establishes that the reasonably likely standard applies only to words or conduct short of express questioning [*United States* v. *Hinckley*, 525 F.Supp. 1342, 1355 (D.D.C. 1981) *aff'd* 672 F.2d 115 (1982)]. Since this Court determined that the conduct of the police officer was not the

functional equivalent of express questioning, there was no occasion for deciding the issue of what type of express questions, under what circumstances, might not be considered interrogation [See, *United States* v. *Foskey*, 636 F2d 517, 522 n.3 (D.C.Cir. 1980)]. Accordingly, that is an issue which has never been decided by this Court.

While the issue is a novel one for this Court, numerous state and lower federal courts have, in the 17 years since *Miranda*, held that certain types of express questions, under some circumstances, do not constitute interrogation under *Miranda*. "Booking" or "pedigree" questions, for example, are generally not considered interrogation [See, *inter alia*, *United States ex rel. Hines* v. *LaVallee*, 521 F.2d 1109 (2d Cir. 1975) *cert. denied sub nom. Hines* v. *Bombard*, 423 U.S. 1090 (1976); *State* v. *Rassmusen*, 92 Idaho 731, 440 P. 2d 837 (1969); *Clarke* v. *State*, 3 Md. App. 447, 240 A.2d 291 (1968); *People* v. *Hernandez*, 69 Cal. Rptr. 448 (Cal. App. 1968)].

One large group of cases holding express questions not to constitute interrogation is based on the language in *Miranda* permitting "general on the scene questioning as to facts surrounding a crime." (384 U.S. at 477). It included questions considered "routine" [*State* v. *Cobb*, 539 P.2d 1140 (Ore. App. 1975); *People* v. *Wright*, 258 Cal. App. 2d 762, 66 Cal. Rptr. 95 (2d Dist. 1968) *cert. denied* 393 U.S. 896 (1968)], "threshold" [*Neal* v. *State*, 152 Ga. App. 404, 263 S.E. 2d 185 (1979); *Shy* v. *State*, 234 Ga. 816, 218 S.E.2d 599 (1975)], "neutral" [*State* v. *Simoneau*, 402 A.2d 870 (Me. 1979); *State* v. *Taylor*, 343 A.2d 11 (Me. 1975)], "preliminary" [*State* v. *Cavegn*, 294 N.W.2d 717

(Minn. 1980), *cert. denied* 449 U.S. 1017 (1980)], "casual, lone and conversational" [*State* v. *Persinger*, 437 P.2d 867 (Wash. 1967)], part of the "res gestae of the arrest" [*Parsley* v. *State*, 453 S.W.2d 475 (Crim. App. Tex. 1970)], or for the purpose of determining the nature of the situation confronted. [*Aldridge* v. *State*, 247 Ga. 141, 274 S.E.2d 525 (1981); *Owens* v. *United States*, 340 A.2d 821 (D.C. App. 1975); *Jordan* v. *Commonwealth*, 222 S.E.2d 573 (Va. 1976)]. Regardless of the varying formulations, what each of these cases has in common is a recognition, either explicit or implicit, that the exception recognized in *Miranda* for general on-the-scene questioning is not limited to non-custodial situations. In each case, the nature of the questioning, rather than the degree of control exerted by the police, was dispositive in determining that a custodial interrogation had not taken place.

Questions concerning the presence of firearms in the immediate vicinity of the police-citizen encounter have almost always been held not to constitute interrogation. Often, courts faced with such questions have used one of the formulations of the on-scene questioning exception to express their reasoning. Thus, these questions have been termed "an on the scene investigation of an emergency situation" [*State* v. *Holsclaw*, 42 N.C. App. 696, 257 SE 2d 650 (1979)], "threshold" [*Tucker* v. *State*, 237 Ga. 777, 229 S.E.2d 617 (1976)], "routine" [*People* v. *McIntosh*, 53 Ill. App. 3d 950, 11 Ill. Dec. 763, 369 N.E.2d 217 (1st Dist. 1971)], "on-the-scene questioning designed to determine what had occurred" [*State* v. *Heath*, 122 Ariz. 6, 592 P. 2d 1302 (Ariz. App. 1979] and "part of the res gestae" [*People* v. *Toler*, 45 Mich. App. 156, 206 N.W.2d 253 (1973); *State* v. *Dhaemers*, 150 N.W.2d 61 (Minn. 1967)]. Most courts, however, have recognized that, in addition to the

ordinary reasons for permitting on-scene questioning, questions concerning the presence of weapons provide additional compelling justification—the protection from harm of the police officer and, where applicable, others present. [*United States* v. *Castellana*, 500 F.2d 325 (5th Cir. 1974); *United States* v. *Ganter*, 436 F.2d 369 (7th Cir. 1970); *State* v. *Heath*, *supra*; *State* v. *Levy*, 292 So. 2d 220 (La. 1979); *State* v. *LaRue*, 19 Wash. App. 841, 578 P.2d 66 (1978); *Pope* v. *State*, 478 P.2d 801 (S.C. Alaska 1977); *Tucker* v. *State*, *supra*; *People* v. *Copperwohl*, 59 Mich. App. 745, 229 N.W.2d 913 (1975); *People* v. *Mullins*, 532 P.2d 733 (Colo. 1975); *People* v. *Toler*, *supra*; *State* v. *Lane*, 467 P.2d 304 (S.C. Wash. 1970); *People* v. *Brown*, 266 N.E.2d 131 (Ill. App. 1st Dist. 1970); *People* v. *Superior Court for County of Santa Clara*, 3 Cal. App. 3d 491, 83 Cal. Rptr. 771 (1st Dist. 1970); *People* v. *Ramos*, 17 Mich. App. 515, 170 N.W.2d 189 (1969); *Ballew* v. *State*, 441 S.W.2d 453 (Ark. 1969); *State* v. *Dhaemers*, *supra*.] These cases are manifestations of the general rule that, where there is a "sufficiently compelling noninvestigatory purpose for asking questions of a suspect who has not been informed" of his *Miranda* rights, courts should allow "any statements made in response to the questions to be used by the prosecution at trial." [*Harryman* v. *Estelle*, 616 F.2d 870, 874-5 (5th Cir. 1980)].

The hearing court's finding that the officer's safety was not in question does not dictate a conclusion that Officer Kraft's actions were unjustified. As in *United States* v. *Castellana*, *supra*, *at* 327, where the trial court had held that the F.B.I. agents had not felt physically threatened, "the mild measures adopted were justified by a reasonable prudence under the circumstances and did not require an

actual fear of imminent harm to validate them." Similarly, in *United States* v. *Ganter, supra,* at 370, the defendant "rather obviously did not have the gun on him at the time" of the question concerning its location inasmuch as he was without his clothing, in *State* v. *Lane, supra,* the defendant was handcuffed and surrounded by police officers, and in *People* v. *Toler, supra,* the defendant had been shot, arrested, and patted down for weapons. In each case, however, the officer's question was deemed to have been reasonably prudent under the circumstances.

Apart from any danger to the police, moreover, Officer Kraft's question concerning the location of the gun appears as a most reasonable and salutary measure to protect other persons—members of the public—from possible consequences of a finding of the gun by a third person. (*State* v. *Heath; Pope* v. *State; Tucker* v. *State; People* v. *Mullins;* Cf., *State* v. *Lane, supra.*) It was a virtual certainty that this firearm—likely a loaded one, as was actually the case—had just been disposed of by the defendant in the supermarket and was lying somewhere in the store, amenable to discovery by any person in the vicinity, adult or child. Wholly apart from the main task of investigating and prosecuting the rape charge against the defendant, therefore, Officer Kraft surely was under a duty of unearthing that weapon as expeditiously as possible. Had he had similar reason to believe that a bomb was lying about, his obligation in the matter would, of course, have been indisputable. [*Cronk* v. *State,* 445 N.E.2d 882, 884 (Ind. App. 1st Dist. 1983).] That the weapon was, instead, a probably loaded pistol, involving a lesser risk of public peril, does not affect the basic obligation of the officer. In

this setting, it would hardly have been reasonable for him to engage in the *Miranda* rituals with the defendant with a view to playing a treasure hunt type of game in the not unlikely event that the defendant refused to cooperate in the retrieving of the gun. While it undoubtedly would have been found by an assiduous police search in time, it is difficult to acclaim a rule that would penalize the police by means of evidentiary exclusion for quickly disposing of this problem by a four-word question to the defendant.

An alternative rationale for the admissibility of questions regarding the location of weapons in the immediate vicinity of the police-citizen encounter is the doctrine of emergency or exigent circumstances. Under this doctrine, it is unnecessary to decide whether the question should be characterized as "interrogation" under *Miranda* because the presence of exigent circumstances is deemed to override the necessity for compliance with *Miranda*. While this Court has never decided whether exigent circumstances can justify the police in asking a question of a person in their custody without providing *Miranda* warnings, it has made it abundantly clear that exigencies of various sorts can justify the police in conducting searches or making seizures without a warrant. [See, *inter alia*, *Warden* v. *Hayden*, 387 U.S. 294 (1967) (hot pursuit); *Schmerber* v. *California*, 384 U.S. 757 (1966) (destruction of evidence); *Michigan* v. *Tyler*, 436 U.S. 499 (19783 (fire); *Terry* v. *Ohio*, 391 U.S. 1 (1968); *Adams* v. *Williams*, 407 U.S. 133 (1972); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) danger).] In *Mincey* v. *Arizona*, 437 U.S. 389, 393 (1978), the Court stated that "The need to protect or preserve life or avoid serious injury is justification for what would be

otherwise illegal absent an exigency or an emergency." There is no reason why this general rule should not apply equally to asserted violations of *Miranda* and the Fifth Amendment as to asserted violations of the Fourth Amendment. The courts of several states have already explicitly done so.

The exifent circumstances doctrine has been most fully developed in California, which anticipated the *Miranda* requirement of preinterrogation warnings in *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P.2d 361 (1965). Subsequent to *Dorado*, but prior to *Miranda*, the California Supreme Court decided in *People* v. *Modesto*, 42 Cal. Rptr. 417, 398 P.2d 753 (1965) that statements made in response to questioning in the absence of warnings were admissible where the investigatory purpose of the questioning was "inextricably interwoven" with the purpose of rescuing a victim of a crime. The "Modesto Doctrine," as it came to be known, was held to survive *Miranda*, and further explicated, in *People* v. *Dean*, 39 Cal. App. 3rd 875, 114 Cal. Rptr. 555 (4th Dist. 1974) and *People* v. *Riddle*, 83 Cal. App. 3rd 563, 148 Cal. Rptr. 170 (2d Dist. 1978) *cert. denied*, 440 U.S. 937 (1979). *Dean* pointed out that "While life hangs in the balance, there is no room to require admonitions concerning the right to counsel and to remain silent." (114 Cal. Rptr. at 559). *Riddle* isolated two assumptions underlying *Miranda*—that the purpose of interrogation was to further criminal prosecution and that it was necessary to outlaw police misconduct—and found them to be irrelevant to an emergency situation in which the objective of the police is to save lives.

In California, the "Modesto Doctrine" has generally been applied to the attempted rescue of kidnap victims or

the location of missing people. Other states, however, have used the same reasoning in other contexts. Thus, in *Commonwealth* v. *Hankins*, 293 Pa. Super. 391, 439 A.2d 142, 144 (1981), it was held that the question "where are the others?", asked of a defendant in custody during a robbery in progress, did not violate *Miranda*. Citing *United States* v. *Castellana*, *supra*, and *Harryman* v. *Estelle*, *supra*, the court held: "Where a question is necessary to insure the safety of bystanders or police officers, and time is a crucial factor, we feel that there is a sufficient state interest to override the necessity of reading *Miranda* warnings."

In *Cronk* v. *State*, *supra*, 443 N.E.2d 882, 884, police officers questioned the defendant about the location and method of detonation of a bomb. In a well reasoned opinion, the court stated that "it might be argued that such questioning was not within the definition of interrogation" under *Miranda* because it "was not intended to elicit incriminating evidence." Instead, however, the court chose to hold that the "questioning was within a necessary exception to the *Miranda* requirement," analogous to the Fourth Amendment emergency doctrine, which was defined in language virtually identical with that found in *Hankins*. While, as indicated, the danger of the bomb in *Cronk* might have been greater than the danger of the gun in the instant case, the reasoning is equally applicable. Indeed, elements of the emergency doctrine can be seen in the opinions in *Pope* v. *State*, *supra*, and *State* v. *Lane*, *supra*, both dealing with questions regarding the presence of guns in the immediate vicinity of the questioning.

In *Terry* v. *Ohio*, *supra*, at 123 this Court said:

> Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty and thousands more are wounded. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

It is undisputed in the case at bar that Officer Kraft was justified in frisking the defendant to see if he was armed, and, indeed, searching him and the immediate area incident to his arrest [*Chimel* v. *California*, 395 U.S. 752 (1969)]. Under the circumstances, the single question "where is the gun?", was no more intrusive than the frisk itself. [*United States* v. *Castellana*, *supra*; *Parkhurst* v. *State*, 628 P.2d 1369 (S.C. Wyo. 1981); *Pope* v. *State*, *supra*; *State* v. *Levy*, *supra*.] Further, when Officer Kraft found an empty shoulder holster, he reasonably believed that there was a gun in the supermarket within a close range of himself, his fellow officers, and the public. To require him to provide *Miranda* warnings to the defendant before asking "where is the gun?" would clearly subject him to unnecessary risk in the performance of his duties. This question was a prudent measure to neutralize the threat of physical harm to anyone in the vicinity which could result

from the discovery of the gun by a friend of the defendant, a curious child, or anyone else who, for any reason, might decide to use it. Police should not be discouraged from taking such measures by requiring them to administer *Miranda* warnings before doing so.

Regardless of whether one says that the question "where is the gun?" does not constitute interrogation because it was part of the *res gestae* of the arrest or because it was designed to clarify the nature of the situation or to protect the officers and the public rather than to elicit an incriminating response, whether one says that it falls within an emergency exception which overrides the necessity of *Miranda* warnings or whether one analogizes it to a protective search, the conclusion is inescapable that the question was a reasonably prudent one under the circumstances. Since the question was proper, there is simply no reason to exclude from evidence the answer, or any evidence obtained derivatively therefrom. That a guilty person may be incriminated thereby is merely a fortuitous circumstance.

POINT TWO

The Defendant's Revolver Was Properly Recovered By the Police, and His Subsequent Declaration of Ownership Properly Elicited, and They Should Not Be Excluded from Evidence.

Since the revolver in question was not recovered from the defendant's person but from a carton where he had deposited it, it was not the product of a search and seizure, unlawful or otherwise, and no Fourth Amendment viola-

tion or claim is here involved. If there was any constitutional infringement, it was of a Fifth Amendment nature relating to the previously discussed declaration of the defendant which immediately led to the recovery of the weapon. Accordingly, if, as we maintained (Point One, *supra*), that declaration was not unconstitutionally or improperly obtained, there would seem to be no basis for suppression of the gun or of the defendant's subsequent statements either. In short, the contention with respect to the gun would fall along with that addressed to the declaration.

Even were the declaration to be deemed improperly obtained, however, such should not taint the admissibility of the gun itself for two reasons. First, the question asked by Officer Kraft, if improper at all, can not be deemed more than a good faith violation of the prophylactic rules prescribed by *Miranda* v. *Arizona* to safeguard the Fifth Amendment; accordingly, no purpose would be served by suppression of evidence obtained derivatively therefrom. Second, even if the question be deemed a violation of the constitution itself, the defendant's revolver and subsequent declaration of ownership thereof need not be suppressed because the revolver would inevitably have been discovered absent the initial declaration regarding its location. Each of these points will be discussed in turn.

A. Evidence Obtained Derivatively from a Good Faith Violation of *Miranda* Need Not Be Suppressed.

Reacting to a volatile situation on the spur of the moment, Officer Kraft asked the defendant about the location of his weapon after handcuffing him and before issuing *Miranda* warnings. Immediately after securing the gun,

Kraft administered warnings to the defendant. Two years later, three members of the New York Court of Appeals determined that the cold record of the suppression hearing was sufficient to establish that "the police responded to an emergency situation in an entirely reasonable manner" (54a) and that "the danger posed to the general public in this case due to the officer's inability to locate a loaded weapon . . . certainly provides a sufficiently compelling noninvestigatory purpose for questioning defendant about the gun's location without first warning defendant of his *Miranda* rights" (57a-58a). Four members of the court, however, were of the opinion that the record was insufficient to establish these conclusions. Under the circumstances, even if the majority is correct that Officer Kraft acted improperly, it can hardly be contended that he did so willfully or negligently, rather than in good faith [Cf., *State* v. *Williams*, 285 N.W.2d 248, 261 (Iowa, 1979), *cert. denied*, 446 U.S. 921 (1980)]. Accordingly, even if the defendant's statement about the location of the gun must be suppressed because it was elicited in violation of *Miranda* (a point which we vigorously dispute in Point One, *supra*), no purpose would be served by suppression of the gun itself and the defendant's subsequent admission of ownership thereof.

In *Miranda* v. *Arizona*, *supra*, this Court held that statements elicited without the prophylactic measures there prescribed may not be used in the prosecution's case in chief (*Id.* at 445). The Court did not directly address the issue of the admissibility of evidence obtained as a result of such statements, nor, for that matter, of the collateral uses to which the statements themselves might be

put. While the opinion contained some language to the effect that "no evidence obtained as a result of [illicit] interrogation can be used against" the defendant (*Id.* at 379), this language has been considered dictum rather than dispositive of the substantial issues a broad reading would entail.

The Court had an opportunity to decide the issue in *Orozco* v. *Texas, supra,* but declined to do so. In *Orozco,* the Court suppressed the defendant's statement as to the location of a weapon but made no comment regarding the admissibility of the gun itself.

In *Harris* v. *New York,* 401 U.S. 222 (1971), this Court held that statements made by a defendant in custody without being advised of his right to appointed counsel could be used to impeach the defendant's credibility should he testify at trial. The Court stated (at p. 224):

> Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

Noting that there had been no suggestion that the defendant's statement had been coerced or involuntary in the traditional sense, the Court then determined that the

benefits to the jury in assessing the defendant's credibility exceeded "the speculative possibility that impermissible polict conduct will be encouraged thereby" (*Id.*, at 224-25). This Court later employed this same reasoning to permit the use for impeachment purposes of a statement elicited after the defendant had stated that he had wished to consult an attorney but had not yet done so [*Oregon* v. *Hass*, 420 U.S. 714 (1975)].

The Court first dealt with the issue of the use of evidence derivatively obtained from a *Miranda* violation in *Michigan* v. *Tucker*, 417 U.S. 433 (1974). The *Tucker* majority explicitly refuted the concurring Justice Brennan's contention that *Miranda*, if applied retroactively, would require suppression of the derivative evidence involved—the testimony of a witness who was discovered as a result of the defendant's statement (*Id.*, at 451, n.26).

Thus approaching the issue as a novel one, the Court first determined that the police conduct complained of—the questioning of the defendant without warning him of the right to have counsel appointed—did not deprive the defendant of his privilege against self-incrimination as such but only violated the prophylactic rules developed to protect that right inasmuch as it bore no "resemblance to the historical practices at which the right against compulsory self-incrimination was aimed" (*Id.* at 444). Since there was no constitutional violation, the Court concluded, the test laid down in *Wong Sun* v. *United States*, 371 U.S. 471 (1963) for determining when evidence obtained derivatively from a constitutional violation must be suppressed (see Point Two B, *infra*), was inapplicable. It was therefore

necessary "to examine the matter as a question of principle" (*Id.* at 476).

Citing the language in *United States* v. *Calandra*, 414 U.S. 338, 347 (1974) to the effect that the prime purpose of the exclusionary rule is to deter future unlawful police conduct, the Court found that the rationale loses much of its force when the official action is pursued in complete good faith (*Id.* at 446-47). Accordingly, whatever deterrent effect the exclusion of the defendant's statement might have had would not be "significantly augmented" by excluding the derivative evidence as well (*Id.* at 448).

The second rationale for excluding the derivative evidence which the Court examined was the protection of courts from reliance on untrustworthy evidence. Here, the Court concluded that there was no reason to doubt the trustworthiness of the derivative evidence—the testimony of the witness who was discovered as a result of the defendant's statement—merely because the defendant was not fully informed of his rights before identifying the witness (*Id.* at 449). Thus finding the reason for exclusion of the derivative evidence unpersuasive, the Court balanced them against "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce" and found that the latter interest outweighed the former ones (*Id.* at 450-51).

While *Tucker* involved a defendant who received partial warnings and who was interrogated prior to the *Miranda* decision and a live witness as the derivative evidence, none of these factors were prerequisites to the Court's analysis.

First, the Court noted that *Miranda* was applicable and did require the exclusion of the defendant's statement because the defendant's trial occurred after the *Miranda* opinion [*Id.* at 448; See, also, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966)]. Second, the fact that the defendant had been given partial warnings was merely the particular factor in that case which established the police officer's good faith; there was no suggestion that this was the only possible factor which could do so. Finally, derivative physical evidence is likely to be more trustworthy, if anything, than derivative testimonial evidence. For these reasons, state and lower federal courts have applied *Tucker* to interrogation occurring after *Miranda* [*United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890 (7th Cir. 1976); *State* v. *Cook*, 170 N.J. Super. 499, 406 A.2d 1340 (1979); *People* v. *Kusowski*, 403 Mich. 653, 272 N.W.2d 503 (1978); *Bartram* v. *State*, 33 Md. App. 115, 364 A.2d 1116 (1976), *aff'd* 280 Md. 616, 374 A.2d 1114 (1977); *Rhodes* v. *State*, 530 P.2d 1199 (Nev. 1975)], in the absence of warnings [*Hudson, supra; Cook, supra; Bartram, supra;* and *Rhodes, supra*), and to derivative physical evidence (*Cook, supra; Rhodes, supra*).

Applying the *Tucker* rationale to the case at bar, it becomes clear that the same result as was there obtained is mandated. Certainly, the conduct of Officer Kraft bore little resemblance to the historical practices which resulted in the right against compulsory self-incrimination. As in *Bartram* v. *State, supra*, 364 A.2d at 1145:

> There was no suggestion that the [defendant] was forced, coerced or threatened in any way to make a confession. There was no prolonged period of incommunicado detention sweeping [him] away from famil-

> iar surroundings or denying [him] sleep, food or drink. There were no inducements or promises made to [him] to obtain a confession. By traditional, pre-*Miranda* standards, there was not a glimmer of that type of involuntariness that is the product of a will overborne.

Accordingly, if there was any improper conduct on the part of Officer Kraft at all, it would only be a violation of the prophylactic rules of *Miranda* rather than of the constitutional right against self-incrimination. The *Wong Sun* test is therefore inapplicable and it is necessary to balance the benefits of exclusion of the evidence against the detriment of doing so.

An in *Harris* and *Tucker*, the possibility that future police misconduct will be deterred by suppression of the derivative evidence in the case at bar is extremely speculative. In the first instance, it must be recognized that the available empirical evidence does not support the proposition that the exclusionary rule in general is successful in deterring such conduct. [Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 755 (1970).] One major suggested explanation for this evidence is that a large proportion of law enforcement activities, of which the challenged conduct in the instant case is an example, is simply not motivated by a desire to prosecute an offender [Oaks, *supra;* Charles Alan Wright, "Must the Criminal Go Free if the Constable Blunders" 50 Tex. L. Rev. 736, 740 (1977); John Kaplan, "The Limits of the Exclusionary Rule," 26 Stanford L. Rev. 1027, 1032 (1974); Harvey Wingo, "Growing Disillusionment With the Exclusionary Rule," 25 SWLJ 573, 576-77 (1971)]. Second, whatever deterrent effect the exclusionary rule

might have in general is significantly lessened when the evidence sought to be excluded is derivative evidence from a *Miranda* violation. Indeed, empirical evidence establishes that the giving of *Miranda* warnings has little effect on the decisions of most criminal defendants to speak [Note, "Interrogations in New Haven: The Impact of Miranda," 76 Yale L.J. 1519 (1967); Griffiths & Ayres, "A Postscript to the Miranda Project: Interrogation of Draft Protestors," 77 Yale L.J. 300 (1967).] It would therefore be irrational for a law enforcement officer to deny a suspect *Miranda* warnings in the speculative hope of obtaining derivative evidence which would still have to be connected to the defendant by evidence independent of his statement when the giving of such warnings may well result in an admissible confession. Finally, whatever deterrent effect the exclusion of the derivative evidence might otherwise have is completely eliminated when we consider that Officer Kraft acted in good faith. Indeed, one federal circuit has already held that the exclusionary rule need never be applied where an officer acts in "good faith and in the reasonable, though mistaken, belief" that the action is authorized [*United States* v. *Williams*, 622 F.2d 830, 840 (5th Cir. 1980), *cert. denied* 449 U.S. 1127 (1981)]. While this Court has not yet determined this issue [but, see *Michigan* v. *De Fillippo*, 443 U.S. 31 (1979), in which this Court held proper an arrest made in good faith reliance on an ordinance which was subsequently declared unconstitutional], it is clear that *Tucker* held the officer's good faith to be a very significant factor in deciding the admissibility of evidence obtained derivatively from a *Miranda* violation.

While the deterrence rationale in the instant case is highly unpersuasive, the "trustworthiness" rationale is

even less persuasive. There simply can be no more trustworthy evidence of the crime of criminal possession of a weapon than the weapon itself. Further, there is no reason to doubt the trustworthiness of the defendant's admissions of ownership of the weapon which were made after the administration of *Miranda* warnings.

As in *Tucker*, therefore, there would be little, if any, purpose served by exclusion of the derivative evidence in this case, even assuming a violation of *Miranda*. When this is balanced against the substantial detriment that an admitted felon must go free if the evidence is excluded, it becomes clear how the interests of the public would best be served.

B. Evidence Which Would Inevitably Have Been Discovered Absent Unlawful Police Conduct Need Not Be Suppressed.

Even if Officer Kraft's question regarding the location of the defendant's gun be considered a violation of the Fifth Amendment itself, there is still no reason to suppress the gun or his subsequent admissions of ownership of it. After Kraft had frisked the defendant and located his empty shoulder holster, he knew with a high degree of certainty that the defendant's gun was within the immediate vicinity of the encounter. He undoubtedly would have searched for it in the carton a few feet away from the defendant without the defendant having pointed it out. The gun having been lawfully obtained, there is no reason to believe that the subsequent statements of the defendant, made after *Miranda* warnings, wuold not have been made. Under the circumstances, no purpose is served by suppression of this evidence.

While this Court has never explicitly adopted the "inevitable discovery" exception to the exclusionary rule, it has recognized its existence without unfavorable comment. In *Brewer* v. *Williams*, 430 U.S. 387, 406 n. 12 (1977), after holding the defendant's statement regarding the location of a body inadmissible in violation of the Sixth Amendment right to counsel, the majority of this Court disputed the minority's contention that it would probably be futile to retry the defendant by saying "evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event even had incriminating statements not been elicited from Williams." Indeed, the Court's prediction turned out to be correct as the described evidence was held to be admissible in an exhaustive opinion of the Iowa Supreme Court in *State* v. *Williams*, 285 N.W.2d 248 (1979), *cert. denied*, 446 U.S. 921 (1980). Later, in *United States* v. *Crews*, 445 U.S. 463, 470 (1980), this Court referred to "inevitable discovery" as one "of three commonly advanced exceptions to the exclusionary rule."

The doctrine of inevitable discovery is derived from this Court's opinion in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), the first case to hold derivative evidence suppressible under the exclusionary rule. In an oft-quoted passage, the Court commented (at p. 392):

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be

> proved like any other, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.

While this passage is subject to varying interpretations, it has been suggested that it was intended to mean that evidence only constitutes a fruit of a prior violation if it can be said that "but for" the violation, the evidence would not have been found [3 W. La Fave, *Search and Seizure*, §11.4 at 617 (1978)]. This, of course, is another way of saying that if the evidence would inevitably have been discovered absent the violation, it need not be suppressed.

Evidence that this Court has interpreted *Silverthorne* as establishing a "but for" test is provided by its opinion in *Wong Sun* v. *United States*, 371 U.S. 471 (1963). After noting that *Silverthorne* was inapplicable because the prosecutor had admitted that the evidence would not have been obtained but for the illegal action, the Court refined the test as follows (371 U.S. at p. 488):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt 221 (1959).

The doctrine of inevitable discovery, then, is perfectly consistent with this Court's opinions on the subject of derivative evidence.

This Court's characterization of the doctrine as "commonly advanced" in *United States* v. *Crews, supra,* is an understatement. Virtually every court which has considered the doctrine has adopted it. [See, *inter alia, United States* v. *Brookins,* 614 F.2d 1037 (5th Cir. 1980); *United States* v. *Leonard,* 630 F.2d 789 (10th Cir. 1980); *United States* v. *Melvin,* 596 F.2d 492 (1st Cir. 1979), *cert. denied* 444 U.S. 837 (1979); *United States* v. *Schmidt,* 573 F.2d 1057 (9th Cir. 1978), *cert. denied* 439 U.S. 881 (1978); *United States* v. *Jarvis,* 560 F.2d 494 (2d Cir. 1977), *cert. denied* 435 U.S. 934 (1978); *United States ex rel. Owens* v. *Twomey,* 508 F.2d 858 (7th Cir. 1974); *Government of the Virgin Islands* v. *Gereau,* 502 F.2d 914 (3rd Cir. 1974); *United States* v. *Seohnlein,* 423 F.2d 1051 (4th Cir. 1970), *cert. denied,* 399 U.S. 913 (1970); *Wayne* v. *United States,* 318 F.2d 205 (D.C. Cir. 1963), *cert. denied* 375 375 U.S. 860 (1968); *State* v. *Allies,* 606 P.2d 1043 (Mont. 1980), *app. after remand* 621 P.2d 1080 (1981); *State* v. *Phelps,* 297 N.W.2d 769 (N.D. 1980); *State* v. *Williams, supra; Leuschner* v. *State,* 397 A.2d 622 (Md. App. 1979), *cert. denied* 444 U.S. 933 (1979), *rehearing denied* 444 U.S. 1027 (1980); *State* v. *Papp,* 64 Ohio App. 2d 203, 412 N.E.2d 401 (1978); *People* v. *Pearson,* 67 Ill. App. 3d 300, 24 Ill. Dec. 173, 384 N.E.2d 1331 (2d Div. 1978); *State* v. *Paz,* 31 Or. App. 851, 572 P.2d 1036 (1977); *Briggs* v. *State,* 76 Wis. 313, 251 N.W.2d 12 (1977); *Commonwealth* v. *Brown,* 470 Pa. 274, 368 A.2d 626 (1977); *People* v. *Horton,* 49 Ill. App. 3d 531, 364 N.E.2d 551 (1st Dist. 1977); *State* v. *Mather,* 147 N.J. Super. 522, 371 A.2d 758 (1977); *Bartram* v. *State,* 33 Md. App. 115, 364 A.2d 1119 (1976), *aff'd* 280 Md. 616, 374 A.2d 1114 (1971); *Rhodes* v. *State,* 530 P.2d 1199 (Nev. 1975); *Morrison* v. *State,* 129 Ga. App. 558 (1973), 200 S.E.

2d 286 (1973); *People* v. *Fitzpatrick*, 32 N.Y.2d 499 (1973), *cert. denied* 414 U.S. 1033 (1973); *State* v. *Tillery*, 107 Ariz. 34, 481 P.2d 271 (1971), *cert. denied* 404 U.S. 847 (1971); *Lockridge* v. *Superior Court of Los Angeles County*, 3 Cal. 3rd 150, 89 Cal. Rptr. 721, 474 P.2d 673 (1970).] In Oregon, this rule has even been codified (O.R.S. 133.683).

In what is probably the leading commentary on the subject, the inevitable discovery doctrine or "*sine qua non* test," as it is there called, is approved in that it "serves well the *raison d'etre* of the exclusionary rule by denying to the government the use of evidence 'come at by the exploitation of . . . illegality' and at the same time minimizes the opportunity for the defendant to receive an undeserved and socially undesirable bonanza." [Robert F. Maguire, "How To Unpoison the Fruit, the Fourth Amendment and the Exclusionary Rule", 55 Journal of Criminal Law, Criminology, and Police Science 307, 317 (Sept. 1964).] Another commentary terms it "a valuable, logical and constitutional principle" which is a logical refinement of the *Silverthorne* test. [Stephen H. La Count and Anthony J. Girese, "The Inevitable Discovery Rule: An Evolving Exception to the Constitutional Exclusionary Rule," 40 Albany Law Review 483, 511 (1976).]

The "inevitable discovery" rule has sometimes been said to involve a hypothetical independent source [White, J., dissenting from denial of *certiorari* in *Fitzpatrick* v. *New York*, 414 U.S. 1050, 1051 (1973); *State* v. *Williams*, *supra*.] What is actually being hypothesized, however, is not the information available to the police independently of the illegal

conduct inasmuch as what must be a matter of record for the doctrine to apply. Rather, what is being hypothesized is the fact that the police, or some other individual, would have taken some action which would have led to the discovery of the evidence in the absence of the illegality. Where the action hypothesized is an extensive one, testimony may be necessary to establish that it would have been engaged in [Eg., *United States* v. *Falley*, 489 F.2d 33 (2d Cir. 1973) (government would have conducted a "saturation investigation"); *Government of Virgin Islands* v. *Gereau, supra* (government was making a "massive effort" to find the killers and the gun)]. Where, as here, the location of the evidence is obvious, however, no such extensive action need be hypothesized in order to establish that it would have inevitably been discovered. Accordingly, testimony regarding what normal police procedures would have been is entirely superfluous [Note, "The Inevitable Discovery Exception to the Constitutional Exclusionary Rules", 74 Colum. L.Rev. 88, 91, 96 (1974)]. Some of the best illustrations of this principle are the cases in which inevitable discovery has been employed as an alternative ground for holding that a weapon found in the immediate vicinity of a defendant who was believed to be armed need not be suppressed merely because the defendant had revealed its location while in custody in response to an inquiry by a police officer without the benefit of *Miranda* warnings. [*United States* v. *Melvin, supra; United States* v. *Ganter, supra; Briggs* v. *State, supra; People* v. *Fitzpatrick, supra; Cook* v. *State*, 8 Md. App. 243, 259 A.2d 326 (1969); *People* v. *Superior Court for Santa Clara County*, 3 Cal. App. 3d 491, 83 Cal. Rptr. 771 (1st Dist. 1970).] In each case, the obvious nature of the location of the weapon

obviated the necessity for testimony regarding normal police procedure. Since Officer Kraft, in the instant case, found the defendant's gun in a carton approximately four feet from where the defendant was standing (17a), no such testimony was necessary to establish that he would have found it without the defendant's statement. Accordingly, any contention that such testimony is lacking, or that the defendant had no opportunity at the hearing to refute such testimony and that that somehow renders the issue "unpreserved" is entirely beside the point.

In *Nardone* v. *United States*, 308 U.S. 338, 340 (1939), the case which first articulated the attenuation doctrine later adopted in *Wong Sun*, this Court stated:

> Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land.

No such overriding public policy exists in the case at bar.

Conclusion

For the Reasons Stated Above It Is Respectfully Requested That the Order of the Court of Appeals of the State of New York Be Reversed.

Respectfully submitted,

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August, 1983

No. 82-1213

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Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

BENJAMIN QUARLES,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the courts below properly found that the question "where's the gun?", in the circumstances of the instant case, was a custodial interrogation impermissible in the absence of prior Miranda warnings.

2. Whether questions of the admissibility of evidence derived from the primary illegality are properly before this Court.

3. Whether the courts below properly suppressed the derivative evidence herein.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-1213

THE PEOPLE OF THE STATE OF
NEW YORK, PETITIONER

v.

BENJAMIN QUARLES

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE
STATE OF NEW YORK

BRIEF FOR RESPONDENT

STATEMENT OF CASE

Facts

At 12:30 a.m., on the 11th of September, 1980, Officer Kraft and his partner were on radio patrol in Queens when they were approached by a woman who said that she had been raped. She told the officers that her assailant

was in a nearby supermarket and that he had a gun (16a).[1] The officers drove up the block to the store and informed the precinct that they were in search of an armed perpetrator at that location (24a). At least two patrol cars came to their assistance, and there were at least four officers on the scene before the arresting officer entered the store (25a). At first the officer saw only a clerk, and then observed the respondent as he was carrying some groceries towards the checkout counter (17a, 25a-26a). The respondent then turned and ran up the aisle toward the rear of the store (28a). The officers entered the store and followed him (17a, 28a-29a).

Officer Kraft and his partner had their weapons drawn (31a). At the back of the store the officers converged on respondent and "in essence

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1 All references are to the Joint Appendix unless otherwise indicated.

surrounded him". Officer Kraft "told him to stop, put his hands over his head" (31a). The respondent stood still, hands raised, surrounded by police with drawn weapons. The arresting officer "moved right next to the defendant", holstered his revolver, and frisked him, without saying a word (32a-33a). On conducting a thorough frisk of the respondent, the officer discovered an empty shoulder holster and nothing more. After the frisk was completed, the respondent's hands were cuffed behind his back (33a). Once the respondent was handcuffed, none of the officers who surrounded respondent had their weapons drawn. According to the arresting officer, they had the situation "definitely" under control (35a).

Speaking for the first time since he had ordered the respondent to halt, the officer "then asked the defendant where the gun was" (33a-34a, 35a- 36a). Looking in the direction of a stack of cartons the respondent

replied "the gun is over there" (34a). The officer went over to the stack, reached his hand into the carton indicated and "found a gun" (35a).

The officer then told the respondent he was under arrest, and read him the Miranda warnings from a pre-printed paper (18a-21a). As to each of the four warnings the respondent was asked whether he understood. The respondent replied that he did understand as to the right to remain silent and the right to have counsel present. The respondent merely shook his head (yes) in response to whether or not he understood that his statements might be used against him. He made no response at all to the question as to whether or not he understood the right to have an attorney provided if he could not afford one, and when asked whether or not he understood that if he had an attorney available he could remain silent until he was able to consult with him the respondent gave "no

answer, no remarks whatever" (20a). He answered "yes" to the question "are you willing to answer any questions without an attorney present?". The officer then asked the respondent whether he owned the gun, and the respondent said he did. To the officer's question of where the gun was bought, the respondent answered "Miami, Florida" (21a). The officer then took respondent to the station house where he was booked and was asked his "pedigree for the arrest report" (21a-22a).

Proceedings Below

Respondent was indicted in the Supreme Court, State of New York, County of Queens, on a single charge of criminal possession of a weapon in the third degree (§265.03 of the Penal Law)(3a).[2]

---

2 Respondent was originally arrested and charged in the lower court with rape and possession of a weapon but only the latter charge was pursued.

Respondent made timely motion pursuant to §710.20 of the Criminal Procedure Law to suppress the admissions made by him and the weapon seized (4a-5a). He alleged that the admissions were obtained in violation of his constitutional rights, CPL §710.20(3) and CPL §60.45(2)(b), and that the weapon was seized as a result of the illegally obtained admission, CPL §710.20 (1) and (4). The petitioner objected to the hearing (9a), but the court ordered what it called a pre-trial Huntley and Mapp hearing (12a-13a).

Only Officer Kraft testified at the hearing (14a-38a). At the conclusion of the hearing, respondent's counsel asked for time to submit a memorandum with respect to the Miranda issue because respondent was not advised of his rights at the appropriate time and "so if the statement falls, then so does the gun..." (37a). The assistant district attorney stated he "may or may not

want to put in a memorandum depending on what Mr. Hyman [counsel for respondent] has to say" (id). Thereafter, respondent filed a brief. None was filed by petitioner (39a-40a).[3]

A decision was rendered by Justice Ferraro suppressing respondent's initial statement, the gun and respondent's subsequent statements. Justice Ferraro held:

> Later cases have held a police officer may ask questions under the Stop and Frisk rule where justified by reasonable suspicion or to protect officers safety (cites omitted). Here the police by handcuffing the defendant had in effect arrested the defendant.

---

3 In the printing of the record, petitioner inadvertently put the papers submitted by respondent as "reply" papers (40a). However, the original order correctly shows that the notice of motion and affidavits were filed by respondent and no papers were filed by petitioner.

> He was now entitled to the Miranda warnings before any questioning as the police had reasonable cause to arrest and the officers' safety was not in question. (43a).

The original statements and gun were therefore suppressed. The subsequent statements were suppressed upon the finding that they were derived from the primary illegality since the improperly obtained admissions let "the cat out of the bag", and the subsequent statements were made within minutes of finding the gun (44a). The court never considered or was asked to consider the good faith of the officer, whether the original statement could be suppressed and the non-testimonial derivative evidence admitted, or whether the weapon would have been "inevitably discovered".

An appeal was then taken to the Appellate Division. For the first time, the petitioner raised a question with regard to "inevitable discovery" (Pet.Br.5). Respondent opposed this argument on the grounds that the issue

was not preserved. No other argument was advanced by petitioner with respect to the exclusionary rule or the admissibility of the derivative evidence. The Appellate Division affirmed without opinion.

Leave was then granted for appeal to the Court of Appeals. Upon that appeal, petitioner and respondent asserted the same arguments that were made in the Appellate Division (id. at 5). The majority of the Court of Appeals affirmed, in a memorandum opinion ruling which held that at the time the respondent was asked the question:

> He was surrounded by four police officers whose guns had been returned to their holsters because, as Officer Kraft testified 'the situation was under control'. Nothing suggests that any of the officers was, by that time, concerned for his own physical safety. (52a)

The court agreed that the statement and the gun were properly suppressed and that the subsequent statements made only minutes later, were tainted

by the pre-warning statement and the seizure of the gun. The court declined to consider an "emergency exception" argument because no evidence of such circumstance was in the record and the issue was not preserved below (52a). The court distinguished two other New York cases which had permitted questions without warnings as inapposite (53a). The dissent argued that neither the letter nor spirit of Miranda was violated (55a). Judge Wachtler discussed officer safety and noted, "[m]ore significantly", that the danger to the public was a sufficient non-investigative purpose for questioning respondent about the location of a weapon in the absence of warnings. Neither the majority nor the dissent discussed inevitable discovery (57a). The petitioner then sought review in this Court.

SUMMARY OF ARGUMENT

Under Miranda v Arizona, 384 U.S. 436 (1966), an individual who has

been taken into custody must be given certain warnings to protect his Fifth Amendment rights before he is subjected to questioning. In this case, where respondent had been frisked and handcuffed and the arresting officer conceded that the situation was "definitely" under control, the question, "where's the gun?" constituted custodial interrogation.

Under the objective tests this Court has established in cases such as Orozco v Texas, 394 U.S. 324 (1969) and Rhode Island v Innis, 446 U.S. 291 (1980), respondent met the two prongs of Miranda necessary to come within its protection. He was in custody in that he was not free to leave, and he was restrained to the degree associated with formal arrest. The question asked by Officer Kraft was an express question reasonably likely to elicit an incriminating response and could not be regarded as a routine administrative question. Although petitioner argues that "exigent circumstances" or "officer safety"

justifies not giving the Miranda warnings, the record does not support any such emergency. The argument of amicus that police may question suspects incident to arrest even after they have been taken into custody, is without legal support and would upset the objective standards established by this court to insure that the police in the field have clear guidelines on when Miranda is to apply.

Petitioner argues for the first time in this Court, that Miranda does not require that derivative evidence be excluded. Neither Michigan v Tucker, 417 U.S. 433 (1974) nor the doctrine of inevitable discovery, support such a ruling in this case. Nor have the issues been preserved for review. While it is now urged that Officer Kraft's good faith and the lack of actual coercion do not warrant exclusion of the gun, the New York courts were never called upon to consider these issues, and no appropriate record was developed. Under

Illinois v Gates, U.S. , 103 S.Ct. 2317 (1983) such questions should not now be considered by this Court. In addition, the exclusion of derivative evidence was based on state law in that the New York statutory scheme provides for the exclusion of evidence independent of federal law, and no federal exclusionary rule was invoked or cited.

The narrow holding of Michigan v Tucker, supra, does not apply to the facts of this case. Exclusion of the derivative evidence is necessary to further the purposes of Miranda and to protect respondent's rights under the Fifth Amendment. Evidence which is derived solely from a tainted confession should not be received in evidence.

The doctrine of inevitable discovery does not apply in this case. Petitioner failed to preserve the issue for appeal because it was not timely raised. The New York appellate courts refused to hear petitioner's

argument and rejected it sub silentio. The failure of petitioner to preserve the issue deprives this Court of jurisdiction. Even if this Court considers the inevitable discovery doctrine, it should not be applied in this case, where no facts were adduced as to the likelihood of the recovery of the weapon and no determination was made by the New York courts as to the burden necessary to overcome the presumption of inadmissibility of the evidence. Under amicus' own argument in Nix v Williams, 82-1651 the necessary facts and proof were not adduced in this case to permit application of the octrine.

POINT I

RESPONDENT WAS ENTITLED TO BE ADVISED OF HIS CONSTITUTIONAL RIGHTS AFTER HE WAS TAKEN INTO CUSTODY AND BEFORE HE WAS QUESTIONED BY THE POLICE

Respondent's privilege against self-incrimination was infringed when Officer Kraft questioned him as to the location of a weapon. Respondent did not knowingly waive his Fifth Amendment rights when he responded to the inquiry because he had not been advised of those rights as mandated by Miranda v Arizona, supra. At the time of the question, respondent had been frisked and found to be unarmed; his hands had been cuffed behind his back and he was surrounded by at least four officers. Officer Kraft acknowledged that at the time he asked the question the situation was "definitely" under control. The question therefore constituted custodial interrogation as that term has been defined by this Court.

In Miranda this Court ennunciated procedural safeguards to protect a

suspect's Fifth Amendment rights when being questioned by the police. The Court required that when "...an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning" the now familiar pre-interrogation warnings be given. (344 U.S. at 478.) Since Miranda, this Court has emphasized that warnings are required in every instance of in custody interrogation. Johnson, v New Jersey, 384 U.S. 719, 730 (1966); Michigan v Payne, 412 U.S. 47, 54 (1973)

The critical questions that are presented in assessing whether Miranda protections are required are whether the suspect was in custody and, if so whether the suspect was subjected to questioning. It is precisely this two-pronged approach which the New York courts followed in determining that respondent was entitled to the warnings. Both the lower court and the majority in the Court of Appeals focused on whether respondent was in

custody and whether the question "where's the gun?" constituted interrogation. The New York courts affirmative determination on both issues is consistent with the record and this Court's interpretations of the relevant terms.

Petitioner and amicus urge this Court to redefine custody and interrogation and to establish new criteria for determining when Miranda is to apply. While petitioner acknowledges that respondent was in custody for purposes of Miranda (Pet. Br. 11), it seeks to establish new exceptions to Miranda where officer or public safety is involved. Amicus, on the other hand, suggests an extraordinary new theory which would permit "in custody" questioning if it is "incident to arrest". This new standard for evaluating whether Fifth Amendment rights of a seized suspect are jeopardized changes the focus of Miranda radically and ignores the clear guidelines heretofore established.

In Rhode Island v Innis, 446 U.S. 291 (1980), the Chief Justice described succinctly the state of the law with regard to Miranda:

> The meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule Miranda, disparage it nor extend it at this late date. (466 U.S. 304.)(Burger, C.J. concurring.)

Justice Burger further cautioned against introducing "new elements of uncertainty" with regard to the application of Miranda (id.). The contentions of both petitioner and amicus, if adopted, will introduce such uncertainty and disrupt the clarity that now exists.

It has been noted that one of the "core virtues" of Miranda is the rigidity and precision with which it is applied. Fare v Michael C., 439 U.S. 1310, 1314 (1978) (Rehnquist, J. on application for stay). See also, Fare v Michael C., 442 U.S. 707 (1979) and California v Prysock, 453 U.S. 355 (1981). As the Court of Appeals for

the Fifth Circuit stated in Harryman v Estelle, 616 F.2d 870, 873-874 (5th Cir. 1980) (en banc) cert. den. 449 U.S. 860:

> The rigidity of the Miranda rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength. [cites omitted] The decision's rigidity has afforded police clear guidance on the acceptable manner of questioning an accused. It has allowed courts to avoid the intractable factual determinations that the former totality of the circumstances approach often entailed. When a law enforcement officer asks a question of an accused and the accused, without the benefit of Miranda's safeguards, answers, the totality of the circumstances is irrelevant. The accused's answer is simply inadmissible at trial as part of the prosecution's case in chief.

It is against these standards of certainty and rigidity, and the resultant clear guidance to law enforcement officials, that the theories of petitioner and amicus should be evaluated. Adherence to these standards will be furthered by a

finding that respondent was subjected to in custody questioning and thereby entitled to Miranda warnings.

A. Respondent Was In Custody For Purposes of Miranda

Petitioner concedes this prong of the test. In its brief, it states:

> There can be little doubt that when the police surrounded and handcuffed the defendant he was in custody within the meaning of Miranda. (Pet. Br. 11)

The record clearly substantiates this concession. The hearing court found that the police had probable cause to arrest respondent, that they apprehended him with drawn guns, that respondent was searched and handcuffed and that the police had "...in effect arrested the [respondent]" (43a). The New York Court of Appeals agreed.

Amicus ignores the petitioner's concession and seeks to distinguish between custody at the time of the initial seizure and custody after the "completed arrest", though the distinction is not supported by the

record or the definition of custody employed by this Court.[4] In Orozco v Texas, 394 U.S. 324, 325 (1969), this Court held that where four policemen entered a suspect's bedroom and questioned him about the location of a weapon, Miranda warnings were required because the individual was "not free to go where he pleased but was 'under arrest'". The opinion of the court did not attempt to parse "custody", nor did it ever suggest that the warnings applied only after the arrest was completed. The subsequent decisions of this Court have not altered the holding in

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4 While amicus argues that the arrest was not completed for purposes of Miranda, it does not contest that at the time of the questioning about the weapon respondent was under arrest. In fact, the very exception it proposes is for questioning "incident to arrest".

Orozco. In Oregon v Mathiason, 429 U.S. 492 (1977), and Beckwith v United States, 425 U.S. 341 (1976), the majority, while declining to apply Miranda, continued to emphasize that Miranda warnings are required when a suspect is not free to leave.

Recently, the court rejected evaluation of custody based upon an assessment of the "totality of the circumstances". In a per curiam opinion, the majority in California v Beheler, ___U.S.___, 103 S.Ct. 3517 (1983) admonished that:

> Although the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving of Miranda protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. (at 3519-3520)

The "simple" inquiry required by Beheler was made in this case, and the New York courts accordingly found "custody" for Miranda purposes. Amicus' argument with respect to the difficulty of defining custody is

unfounded. Where indicia of arrest are present, such as drawn weapons or handcuffs, then custody clearly exists. See generally, Dunaway v New York, 442 U.S. 200 (1979); United States v Mendenhall, 446 U.S. 544, 554 (1980) (Stewart, J); United States v Jiminez, 602 F.2d 139 (7th Cir. 1979); United States v Lara, 638 F.2d 892 (5th Cir. 1981). Further inquiry is not required. Where there is restraint equivalent to arrest Miranda attaches.[5]

The point at which Miranda warnings are to be given has never been in dispute. As Justice Powell noted in Doyle v Ohio, 426 U.S. 610, 617 (1976), Miranda requires that "a person taken into custody be advised immediately..." of his rights. In any event, the critical issue is not when

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5 Mr. Justice White, in his dissent in Orozco noted that "once arrest occurs, the application of Miranda is automatic. (394 U.S. at 329)

in the arrest process warnings are given but only that they be given prior to interrogation.

Amicus suggests that even where arrest has occurred in the Fourth Amendment context, custody has not been effectuated for Fifth Amendment purposes. While such circumstances could conceivably be hypothesized it is more likely that "seizure under the fourth amendment [will be] quite similar to the determination of 'custody' triggering rights under the Fifth Amendment". Moore v Ballone, 658 F.2d 218, 226-7 (4th Cir. 1981). In any event, there can be no basis for distinguishing between varieties of custody in this case. Clearly, as the courts below found, respondent's seizure was custody for purposes of the Fifth Amendment and Miranda.

B. Respondent Was Subjected To Custodial Interrogation When He Was Asked "Where's The Gun?"

1. The question "where's the gun?" was an express question which the officer knew or should have known

was reasonably likely to elicit an incriminating response. Under Miranda, respondent had to be advised of his rights before he was subjected to such questioning. As this Court held in Rhode Island v Innis:

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. (446 U.S at 300)

In this context Justice Stewart then proceeded to define "interrogation" as including express questioning and:

> ...any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. (446 U.S. at 301)(footnotes omitted)

Petitioner seeks to use the reference in Innis to questions "normally attendant to arrest and custody" as a means of circumventing Miranda in this case by suggesting that the question "where's the gun?" is "normally atten-

dant".[6] Petitioner's argument, however, misconstrues the scope of the words or actions by the police which were intended by this Court not to be interrogation under Miranda.

First, petitioner's proposed expansion of "normally attendant" would directly overrule Orozco v Texas, where this Court explicitly held that when a question about the location of a weapon was not preceded by the required warnings, use of the admissions obtained was a "flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in Miranda" (395 U.S. at 326). Neither the majority nor the dissent in Orozco ever intimated that a question to a suspect at the scene of the arrest

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6 Petitioner cites United States v Bennett, 626 F.2d 1309 (5th Cir. 1980) cert. den. 449 U.S. 1092. However, in Bennett there was neither questioning nor its functional equivalent.

about the location of a weapon was not covered by Miranda because it was "normally attendant to arrest and custody". In addition, Innis itself dealt with the location of a weapon, and a conclusion that inquiry in that area would be "normally attendant" would render the Court's discussion of interrogation in Innis merely dicta.

Further, this Court has never suggested that the exempt area of questioning should extend to such obviously incriminating questions as the one at issue here. Even amicus does not urge this Court to permit the question asked by Officer Kraft under a "normally attendant to arrest and custody" exception. Rather it acknowledges that "normally attendant to arrest and custody" is intended to encompass "routine administrative questioning". (Am. Br. 12).

Routine administrative questioning has been recognized to be outside the protective area of Miranda in light of its non-investigatory purpose and the nature of the response likely to be

elicited. Thus, the courts have generally permitted questions related to the booking process to be asked without pre-interrogation warnings. See, e.g, United States v Menichino, 497 F.2d 935 (5th Cir. 1974); United States ex rel Hines v La Vallee, 521 F.2d 1109 (2d Cir. 1975) cert. den. 423 U.S. 1090; United States v Prewitt, 553 F.2d 1082 (7th Cir. 1977) cert. den. 434 U.S. 840; United States v Foskey, 636 F.2d 517 (D.C. Cir. 1980); United States v Hinckley, 525 F.Supp. 1342, 1356 n.8 (D.C. 1981) aff'd 672 F.2d 115 (D.C. Cir. 1982); compare Proctor v United States, 404 F.2d 819 (D.C. Cir. 1968). See also Note, The Applicability of Miranda to the Police Booking Process, 1976 Duke L.J. 574; Smith, The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?, 25 South Carolina L.R. 699, 704 (1974). As these cases and commentaries make clear the questions permitted as attendant to arrest and custody are strictly limited to those

which elicit information necessary to identify and process a suspect. As the court in United States ex rel. Hines v La Vallee, supra, observed:

> We recognize that this exception to Miranda lends itself to the possibility of abuse by police who might, under the guise of seeking pedigree data, elicit an incriminating statement. However, as long as the exception is limited to simple identification information of the most basic sort (e.g., name, address, marital status) the risk is minimal. (521 F.2d at 1113, n.2)

Administrative inquiries, such as the request to submit to blood-alcohol tests or fingerprinting, may also be permissible where they are uniformly requested of all suspects and "highly regulated by state law" Neville v South Dakota, ___ U.S.___ 103 S.Ct. 916, 923 n.15 (1983). Such inquiries are routine and non-investigatory and the request to take a test or submit to a physical analysis does not jeopardize a suspect's right against

self-incrimination. See, Arenella, Schmerber and the Privilege Against Self-Incrimination: A Reappraisal, 20 Am.Crim. L.R. 31, 56-58 (1982).

Permitting such administrative questions does not extend the "attendant to arrest and custody" language to areas that are obviously likely to elicit evidence of criminal activity from a suspect in custody. The distinction between interrogation and routine administrative inquiry is readily defined by the very test suggested by the plurality opinion in Innis. If the question is reasonably likely to elicit an incriminating response, then it falls within the purview of Miranda and warnings must be given, Harryman v Estelle, supra; United States v Downing, 665 F.2d 404 (1st Cir. 1981).

Whether or not Officer Kraft had non-investigatory motives cannot be discerned from this record, and is, under Innis, irrelevant. Using the objective test set forth in Innis, it is evident that the respondent's

response had to be potentially incriminating. See, White, Interrogation Without Questions, 78 Mich. L.Rev. 1209, 1228-1236 (1980). The question asked by Officer Kraft was not routine or administrative. It was investigatory in nature and reasonably likely to elicit an incriminating response. The import of the question was to have respondent locate evidence, a gun, which would be used in criminal proceedings against him. Since respondent was in custody at the time of the question, his privilege against self-incrimination was jeopardized unless he was given the procedural safeguards required by Miranda.

The proposed exemption from the meaning and scope of "interrogation", of questions such as "where's the gun?" would require that a variety of new factual inquiries be made. The objective tests for custody and interrogation so carefully set up by this Court would be upset. Judge Wachtler, in his dissent to the Court

of Appeals' opinion, suggests that questions which are "official conduct designed to achieve an articulable and legitimate non-investigatory purpose" (56a) are outside of the scope of "interrogation" as defined by this Court.[7]

Such distinctions would necessarily lead to a case by case evaluation of the totality of circumstances and the "intractable factual inquiries" that this Court has sought to avoid. They would open an area of uncertainty focused on the subjective intent of the interrogator. This would constitute a serious erosion of the

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7 Judge Wachtler himself cannot isolate the particular factor that would exempt a question as non-investigatory. He suggests officer safety as the basis for exempting the question "where's the gun?", but notes, "more significantly", that the question should be exempt because of the danger posed the general public (57a).

underlying principles established by this Court in Miranda, Orozco, and Innis.

2. Petitioner argues that even if the question "where's the gun?" constituted interrogation, the question should nevertheless not require Miranda warnings by reason of proposed exceptions for "officer safety" and "exigent circumstances". Essentially, petitioner argues that danger to the officer and/or the general public justifies an exception to the Miranda rule. While such a theory may be appropriate under certain circumstances, the record in this case does not give rise to any such exception.

As the New York courts expressly found, there was no threat to the safety of the arresting officers at the time of the interrogation. Respondent was apprehended away from the scene of the alleged crime by at least four policemen with drawn weapons; he was frisked and found to be unarmed. Respondent was then handcuffed and the officers surroundering

respondent holstered their weapons since, according to Officer Kraft, the situation was "definitely" under control. No actual or potential accomplice was alleged or claimed to be present. The respondent and the officers were alone at the scene of the arrest. By the time Officer Kraft posed the question to respondent he had been "reduced to a condition of physical powerlessness" (53a) and was totally within the control of the police. Had the officers any reason to fear for their safety, any of them could have immediately removed respondent from the scene. Pespondent's arrest had been effectuated and as the hearing court found, the "officers safety was not in question" (43a).

The difference between the facts established in this record and those in the cases cited by petitioner in support of its position is significant. Lack of physical restraint of

the suspect; i.e. United States v Castellana, 414 F.2d 325 (5th cir. 1974), State v Heath, 122 Ariz. 6. (Ariz. App. 1979), or clarification at the crime scene before effectuating an arrest; State v Levy, 229 So.2d 220 (La. 1979), Pope v State, 478 P2d 801 (S.C. Alaska 1977); or actual and imminent danger, Tucker v State, 237 Ga. 73 (1976), People v Riddle, 83 Cal. App.3d 563 (2d Dist. 1978) cert. den. 440 U.S. 937; may justify a different result.

The majority in the New York Court of Appeals recognized the significance of these factors in distinguishing this case from the two New York cases where questioning without Miranda warning was permitted (53a). In People v Huffman, 41 N.Y.2d 29 (1976), the question "what are you doing here?" was permitted when police inadvertently came upon a crime in progress and attempted to clarify the situation, while in People v Chestnut, 51 N.Y.2d 14 (1980), the question "where is the gun?" was permitted when

police came upon a suspect who was probably armed and had not yet been frisked or restrained.

Clearly, if concern for the safety of the officer is to override the rights traditionally accorded the suspect, then the basis for such action should be supported in the record. It would be inappropriate to establish the broad exceptions petitioner urges on a record where the officer states the situation was under control, and the facts support no other conclusion. The officer's search for the weapon was, as the New York courts found, not related to officer safety since it occurred after the respondent had been secured and arrested. As in Orozco v Texas, where safety was not found to be a factor, the question "where's the gun?" had to be preceded by Miranda warnings.

Petitioner also suggests that public safety or exigent circumstances justified the question by Officer Kraft. However, as the Court of

Appeals correctly points out:

> there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted any such concern. (52a)

The question of whether public "safety" provides an exception to the Miranda rule was not preserved for review under New York law. The Court of Appeals held that no such theory was advanced at the suppression hearing and that therefore no factual determination was or could be made with regard to it (52a). Under Webb v Webb, 451 U.S. 493 (1981), the argument is therefore not available to petitioner in this Court [8]

The search for a weapon by law enforcement officials because of a generalized concern for the public welfare cannot override an individual's right against self-incrimination. Rhode Island v Innis, supra, involved the location of a

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[8] See discussion POINT IV, at pp. 77-81.

shotgun disposed of near a school for handicapped children. This Court, though it commented on the laudable motives of the officers in their efforts to locate the weapon, (446 U.S. at 302), did not find that such public safety considerations reduced the scope of Miranda. The speculative danger that petitioner posits in this case cannot be the basis for custodial interrogation without benefit of Miranda warnings.

The proposed public safety exception would "swallow the rule". The public safety concerns expressed by petitioner have no boundaries in time or place. The question can be asked at arrest, in the stationhouse or even in court. It can encompass a multitude of possible dangers both real and hypothetical. Such an exception offers no objective standard for the police officer in the field and in the end may not be an exception to Miranda but an abnegation of it.

C. The Incident To Arrest Rationale Is Inappropriate In The Miranda Context

Amicus urges this Court to carve out an area of questioning exempt from the protection of Miranda as "incident to arrest". The rationale offered by amicus in support of such a proposition is that the coercive environment of an arrest is different than that which was envisioned in the stationhouse investigation covered by Miranda (Am. Br. 14-19). Yet this very argument has been previously rejected by this Court.

In Orozco v Texas, this Court "put beyond doubt" that Miranda applies to the arrest scene as well as the stationhouse. United States v Hall, 421 F.2d 540, 544 (2d Cir. 1969) cert. den. 399 U.S. 990 (1970); See also, White, supra, 78 Michigan L.R. at 1221 n.98. Since Orozco this Court has continued to emphasize that the critical questions remain "custody" and "interrogation" and not the location of the interrogation (Oregon v

Mathiason, supra and California v Beheler, supra) or its purpose (Beckwith v United States, supra). Amicus' argument that the degree of coercion inherent in one place rather than another should be a significant factor in the application of Miranda, simply disregards the state of the law and the purpose of the rule.

The "incident to arrest" theory fails to meet two other aspects of Miranda. First, it ignores the very premise of Miranda, that in custody questioning, wherever it takes place, is presumed coercive unless the warnings are given. See, Johnson v New Jersey, supra. Amicus' theory appears to require that an individual establish that any response he made at the time of arrest was involuntary and the result of subjection to a coercive atmosphere. Not only does this argument impermissibly shift the burden back to the defendant, but it also requires the case by case analysis that Miranda specifically ruled out.

Second, the "incident to arrest" rationale offers no "objectively defined pressure point", United States v Henry, 447 U.S. 264, 283 n.6, (1980), (Blackman, J. dissent), or "trigger" where compelled interrogation is presumed to take place unless Miranda rights are given. Amicus concedes that respondent was placed under arrest and handcuffed, yet contends that the arrest was not complete and therefore questioning related to the arrest in time or subject matter is permissible. Amicus, offers no clear definition of when the arrest is "complete" or what questions are to be permitted. Indeed, amicus argues that the "clarity of the Miranda rules" should not be "overstated" (Am. Br. 11) and that police officers such as Officer Kraft will "intuitively" distinguish between questioning incident to arrest and investigative questioning (id. at 13). As set forth above, such arguments are inconsistent with the state of the law. The proposed

"incident to arrest" exception would return the law to the very confusion out of which Miranda, Orozco, and Innis arose and which the Court has sought, successfully, to avoid.

Amicus also raises the spectre that the decision below in this case will have "mischevious consequences" in cases dealing with investigative stops under Terry v Ohio, 392 U.S. 1 (1968). Such concern is misplaced. This case does not involve the thorny problem of defining when a stop without probable cause becomes a seizure under the Fourth Amendment. See United States v Mendenhall, supra; Florida v Royer, 445 U.S. 986 (1983) and United States v Place, ___ U.S.___ 103 S.Ct. 2637 (1983). In this case, no such problem exists. Both the parties and the courts below agree that when respondent was stopped he was subjected to arrest. Having been seized to the "degree associated with a formal arrest" and there being no dispute as to the probable cause for such arrest, the question of the scope

of a Terry stop under Miranda is not before this Court. Nor does this case involve the scope of general on-the-scene questioning permitted under Miranda, as amicus seems to argue. While police may conduct such questioning of other persons, they may not do so of the person taken into custody. Schneckloth v Bustamonte, 412 U.S. 218, 232, 239-240, n.29, (1973).

The decision of this Court in Miranda constituted clear guidance to the courts and to law enforcement officials as to the steps which must be taken to protect the constitutional rights of those in police custody. Each of the decisions of this Court following Miranda has served to clarify and resolve outstanding issues regarding the application of those protections without substantially altering the fundamental scope of that decision or its threshold determination - custodial interrogation.

To affirm the decision of the Court of Appeals herein is to reaffirm

the simple principle that has guided law enforcement with respect to the rights of defendants at the time of arrest for the past seventeen years; an individual in custody must be advised of his constitutional right not to incriminate himself before he is led to do so. Each of the grounds open which this Court has been urged to reverse the decision below would upon areas of uncertainty and questions of application of the Miranda principle which cannot be resolved by reference to the facts of the instant case and would imperil the uniform protection now afforded under Miranda.

POINT II

THE ISSUE OF THE ADMISSIBILITY OF THE DERIVATIVE EVIDENCE IS NOT PROPERLY BEFORE THIS COURT

The issue of whether the derivative evidence[9] is admissible, even if the initial statement is excluded was not preserved for consi- deration by this Court.[10] At no time in the state court proceedings did petitioner argue that the fruits of the improperly elicited admission should be admitted, or that the good

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9 Petitioner argues that both the gun and the subsequent statement should be admitted, while amicus limits its argument to the gun itself.

10 Both petitioner and amicus rely on Michigan v Tucker, 417 U.S. 433 (1974) in urging reversal of the Court of Appeals on the issue of exclusion. Both argue as well that the gun should be admitted on the basis of the "inevitable discovery" doctrine, which is discussed herein at Point IV, infra.

faith of the officer required modification of the exclusionary rule. Further, a review of the moving papers and opinions below reveals that an independent and adequate state ground may exist for the suppression of the derivative evidence, and that such evidence was not excluded on the basis of the federal exclusionary rule.

In Illinois v Gates, U.S. , 103 S.Ct. 2317 (1983), this Court declined to consider the state's argument as to the scope of the federal exclusionary rule because it was not argued below. As Justice Rehnquist stated:

> The state never, however, raised or addressed the question whether the federal exclusionary rule should be modified in any respect, and none of the opinions of the Illinois courts give any indication that the question was considered. (103 S.Ct. at 2323.)

The Gates opinion further noted that:

> absent the adversarial dispute necessary to apprise the state court of the arguments for not applying the exclusionary rule, [the Court] will not consider the question whether the exclusionary

rule should be modified. (id at p.2324).

Under the "not pressed or passed upon below" rule, and the jurisdictional limitations of 28 U.S.C. 1257(3), the state's arguments with respect to the federal exclusionary rule were rejected.

The holding of Gates is equally applicable to the exclusionary rule argument advanced by petitioner in this case. The New York courts were never confronted with the question of whether the derivative evidence should be admitted notwithstanding the Miranda violation because that point was never argued.[11] In its brief, petitioner urges that:

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11 The hearing court did, sua sponte, reach the distinct question of whether or not the subsequent statements were, in fact, derived from the primary illegality. The determination that they were so derived was not an examination of the scope of the exclusionary rule.

> While a statement elicited in violation of Miranda must be suppressed on the authority of Miranda, evidence obtained derivatively therefrom is not per se inadmissible. (citing Tucker). Rather, the nature of the particular violation must be balanced against the intent of making relevant, trustworthy evidence available to the trier of fact [citing Tucker]. In the case at bar, even if it be determined that Officer Kraft acted improperly, there can be no doubt that he did so in good faith and not wilfully or negligently. (Pet. Br. 7-8).

Petitioner, however, never urged any court below to "balance" competing interests or to determine the "good faith", "wilfullness" or "negligence" of Officer Kraft. The lower courts made no finding with regard to these issues because they were not called upon to do so. The courts below never evaluated the degree of coerciveness at the scene because the question was never raised below. There was, therefore, "no real contest" on the issue now before this Court. See Morrison v Watson, 154 U.S. 111, 115 (1894).

In Gates it was argued that the scope of the exclusionary rule need not have been challenged below, since it was settled federal law which the state could have done little to modify, and that therefore, any argument would have been futile. (See the dissent of White, J. at 2338.) Nevertheless, the majority required that a full record be made below before the issue could be considered by this Court. (See Cardinale v Louisiana, 394 U.S. 437, 439 (1969)).

In the case at bar, the failure to assert the question below and the absence of the New York courts' interpretation and findings thereon, are all the more serious. This is so since the question of whether derivative non-testimonial evidence is to be excluded under Miranda is not settled. See Michigan v Tucker, 417 U.S. at 453 n.26 and compare with 460 n.5. In such circumstances this Court should afford the state courts an "opportunity to consider the question

in the first instance". Webb v Webb, 451 U.S. at 500. Illinois v Gates, supra. The state should, as a matter of comity, be the first to "pass upon and correct" alleged violations of federal rights. Picard v Connor, 404 U.S. 270, 275 (1971). This is particularly the case where, as here, there may well exist state law that would pretermit this Court's consideration of the issue. Webb v Webb, supra at 591.

The petition for certiorari submitted herein asserts error in the exclusion of the gun in that "The court below improperly assumed that physical evidence obtained derivatively from a Miranda violation must always be suppressed" (Cert. Pet. 9). In view of the failure to raise the question prior to the petition in this Court, petitioner should not now be heard to blame the lower court for its "assumptions". The New York courts acted appropriately based on the record before them.

Petitioner's failure to raise the exclusionary issue below also undermines the argument it now raises that the suppression of the derivative evidence was based upon a misapplication of federal law. Having failed to make the argument at the suppression hearing, the issue was not preserved for appeal in the New York courts by reason of the state's issue preservation doctrine.[12] Since the issue would have been barred from being considered by the New York appellate courts, had petitioner attempted to raise it, it is well settled that this Court may not now consider the question. Daniels v Allen, 344 U.S. 443, 458 (1953).

Of greater significance, however, is that the exclusion of the evidence in this case may well have been based entirely on state law. The federal

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12 See discussion at Point IV, infra, pp.77-81.

exclusionary rule was not the apparent basis for the suppression. New York's statutory exclusionary rule specifically provides for exclusion of evidence derived from an impermissibly elicited statement. The motion to suppress the evidence in this case was made under the statute, §710.20 of the Criminal Procedure Law. The section provides for the suppression of tangible evidence which is illegally seized, §710.20(1); testimony describing a statement of a defendant obtained involuntarily within the meaning of §60.45,[13] §710.20(3); and evidence which "was obtained as a

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13 Section 60.45(2)(b) provides that any statement which is obtained "in violation of such rights as the defendant may derive from the constitution of this state or the United States is involuntarily made". The failure to give Miranda warnings is a violation under this section. People v Graham, 55 N.Y.2d 144, 149-50 (1982).

result of other evidence obtained in a manner described in subdivisions one...and three", §710.20(4). The decision of the lower court specifically made reference to this section as the basis for the hearing (41a) and then granted the motion to suppress (39a-40a).

It fairly appears that the suppression of the evidence in this case was dictated by the New York statutes. The absence of Miranda warnings was the basis for the determination that respondent's rights were violated, but the scope of the exclusion of evidence was premised upon the application of the state law. The construction of §710.20(4), as to the meaning of "obtained as a result of" other evidence impermissibly obtained, may be disposi- tive of the exclusionary issues petitioner now seeks to raise. Such state statutory construction, unless explicitly mandated by federal law, will not be reviewed by this Court.

Wright, Law of Federal Courts, §107 (4th Ed. 1983); Herb v Pitcairn, 324 U.S. 117, 125-126 (1945).

Other than the initial reference to CPL §710.20 by the hearing court, the state court opinions below make no reference to the authority for excluding the primary or derivative evidence and do not invoke any federal law with respect thereto. This Court, in Michigan v Long, ___U.S. .W., 103 S.Ct. 3469, (1983), has recently noted that where a state court decision "appears to rest primarily on federal law, or to be interwoven with the federal law" a federal question is presented unless the state court specifically indicates an adequate and independent state ground (103 S.Ct. at 3476). However, the total absence of federal authority in the state opinions herein with respect to exclusion, together with the reference to the state statute, does not create a situation in which the exclusion is "primarily" based upon or "so inter-

woven" with federal law as to have properly presented the issue to this Court.

Any uncertainty as to the basis of the exclusion of the derivative evidence is due solely to petitioner's failure to raise the issue below. Had petitioner sought to argue that derivative evidence need not be excluded where a Miranda violation exists, the New York courts would have been called upon to rule on this significant question. Because petitioner waited until this case came before this Court to raise it, however, the issue was not preserved for review. See Illinois v Gates, supra and cases cited therein.

POINT III

SHOULD THIS COURT REACH THE QUESTION OF THE EXCLUSION OF THE DERIVATIVE EVIDENCE HEREIN, THE SUPPRESSION SHOULD BE AFFIRMED

Had the New York Court of Appeals affirmed the original suppression of the derivative evidence in the case at bar on the basis of existing federal law, it would have been correct in doing so. Respondent's initial statement, "the gun is over there", was obtained in derrogation of his Fifth Amendment rights and of the rule established by this Court in Miranda v Arizona, supra. The gun itself was recovered as the immediate and direct consequence of the improperly obtained admission. Immediately following the recovery of the weapon, the officer "read the defendant his rights". Two subsequent admissions, that the respondent owned the gun and that it was purchased in Miami, Florida, were then made in response to the officer's questioning. It was clear, as the suppression court found, that the

initial admission had "let the cat out of the bag". The recitation of the warnings immediately thereafter did not suffice to attenuate the subsequent admissions.

This Court has long adhered to the fundamental principal that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all". Silverthorne Lumber Company v United States, 251 U.S. 385, 393 (1919), per Holmes J. The application of the exclusionary rule to derivative evidence has been seen not only as a deterrent to lawless law enforcement generally, but as a necessary concommitant to the constitutional rights from which the rule is derived. See, for example, Boyd v United States, 116 U.S. 616 (1886); Weeks v United States, 232 U.S. 383 (1914); Adams v New York, 192 U.S. 585 (1904).

The self-incrimination clause is, by its terms, concerned not just with

the conduct of government agents, but with the source of evidence which may be used in a criminal proceeding against a citizen. Counselman v Hitchcock, supra; Wong Sun v United States, 371 U.S. 471 (1963). In United States v Williams, 401 U.S. 646 (1971) (Brennan, J. concurring). In Bruton v United States, 391 U.S. 123, 141 (1968), Justice White, in his dissent, pointed out:

> It must be remembered that a coerced confession is not excluded because it is thought to be unreliable. Regardless of how true it might be, it is excluded because specific provisions of the Constitution demand it, whatever the consequences for the criminal trial.

The impact of the exclusion of admissions obtained in derogation of the self-incrimination clause would be greatly lessened if, as petitioner urges, evidence derived solely from such admissions could be used in court, as the petitioner and amicus suggest.

The first and fundamental purpose of the exclusion of derivative evidence in the instant context is that it is the only effective way to give substantive meaning to the self-incrimination clause. Amicus concedes that derivative evidence must be suppressed if the initial violation is of the self-incrimination clause of the Fifth Amendment itself (Am.Br. 26-27), and petitioner makes no argument to the contrary. This conclusion is firmly rooted in the values underlying the self-incrimination clause as expressed in Counselman v Hitchcock, supra; United States v Crews, 444 U.S. 463, 471 (1980); Manness v Meyers, 419 U.S. 449, 463 (1975); Harrison v United States, 392 U.S. 219 (1968); United States ex. rel. Hudson v Cannon, 529 F.2d 890, 892-893 (7th Cir. 1976); Parker v Estelle, 498 F.2d 625, 629 (5th Cir. 1974), cert. den. 421 U.S. 963 (1975).

A. The Derivative Evidence Herein Should Be Suppressed Because The Respondent's Fifth Amendment Right Against Self-Incrimination Was Violated

While indisputably in custody in an inherently coercive situation, and without having been made aware of his rights, the respondent was subjected to questioning. As a result of that questioning respondent made incriminating admissions, and divulged the whereabouts of incriminating evidence. In such circumstances, the respondent's Fifth Amendment rights against self-incrimination have been violated and the admissions and evidence must, therefore, be suppressed.

The total failure to provide Miranda warnings, prevents the use of the results of in custody interrogation against the respondent since such use is "a flat violation of the Self-Incrimination clause of the Fifth Amendment as construed in Miranda." Orozco v Texas, supra, 394 U.S. at 327. As this Court stated in the

Miranda decision itself, "the privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner". 384 U.S. at 477.

Both petitioner and amicus rely heavily on Michigan v Tucker, supra, to buttress their argument that the respondent's self-incrimination as a result of the custodial interrogation without the benefit of warnings was no more than a violation of the prophylactic rule of Miranda. The rationale of Michigan v Tucker is, however, inapplicable.

In Tucker, the court first considered "whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right", and only then "whether the evidence derived from this interrogation must be excluded" (417 U.S. at 440). Each facet of the

Court's analysis clearly distinguishes Tucker from the instant case, and suggests that a different result should be reached herein.

As to the question of whether or not Tucker's underlying right against compulsory self-incrimination had been violated, the Court described Miranda as making it clear that "the privilege against compulsory self-incrimination was seen as the principal protection for a person facing police interrogation", and as offering "more comprehensive and less subjective protection than the doctrine of previous cases" 417 U.S. at 443. The Tucker court quoted the Miranda decision at length, including the following:

> In these cases we might not find the defendant's statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest....To be sure the records did not evince overt physical coercion or patent psychological ploys. The fact

> remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statments were truly the product of free choice. (417 U.S. at 444).

The Court went on to evaluate the facts in light of the Miranda requirements and found:

> that the police conduct did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since Miranda. 417 U.S. at 445.

The salient factors of that determination are readily discerned in the opinion. Tucker was, in fact, advised of all the requisite rights except that he had a right to appointed counsel if he could not afford one. The Tucker court characterized this as "an inadvertent disregard of the procedural rules later established in Miranda" (ibid).

The record in the instant case

stands out in stark contrast to that presented in Tucker. Tucker received the substance of each of the Miranda warnings. Respondent herein was not advised of any of his Fifth Amendment rights. Absolutely no safeguards were afforded the respondent to insure that his statement and production of evidence "were truly the product of free choice" (384 U.S. at 457). Respondent was subjected to those circumstances which the court, in Miranda, held to give rise to a presumption of compulsion in the absence of the necessary safeguards. While the respondent was not subjected to the lengthy stationhouse interrogations that the Miranda court examined in detail, he was certainly and suddenly subjected to a police dominated atmosphere with its inherently coercive aspects. It cannot be said on the basis of the record herein, that the respondent's will was not, in fact, overborne when he was surrounded by at least four officers with weapons drawn, handcuffed, frisked, and interrogated as to the location of the

evidence. The total failure of the officers to give the respondent warnings prior to the interrogation signifies that the respondent did not know that he need not respond, that he had a right to counsel or that any response he made could be used to convict him.

Nor can the conduct of the police in this case be characterized, as it was in Tucker, as an inadvertent disregard of procedural rules. At the time of the confrontation between the officers and respondent herein, every law enforcement official in the nation, including Officer Kraft, was fully familiar with the requirements esta- blished in the Miranda decision (19a).

In Tucker, the prosecution was able to demonstrate to this Court's satisfaction that, in the limited circumstances there presented, the police conduct complained of was a violation of a "prophylactic rule" rather than the "constitutional

standards" that Miranda set forth. 384 U.S. at 491. In this case, the prosecution made no such showing. The presumption that compulsion occurred has by no means been dispelled. In fact, amicus concedes that the circumstances of the arrest may give rise to "unprovable compulsion" (Am.Br. 27). In view of the unchallenged presumption of compulsion and the substantial likelihood that the admissions and evidence obtained as a result thereof were not the product of the respondent's free will, the suppression of such admissions and evidence should be affirmed.

Neither petitioner nor amicus argues that the two statements made by respondent were in any way purged of taint by the intervening recitation of Miranda warnings. Petitioner argues, however, that the subsequent statements are admissible under the rationale of Tucker. Tucker does not deal with the admissibility of a defendant's own statements, however, and is therefore inapplicable. As the

New York courts held, the post-warning statements followed almost immediately the improperly elicited admission which let the "cat out of the bag". The subsequent statements should, therefore, be suppressed. See United States ex. rel. B.V. Shelly, 430 F.2d 215, 218 (2nd Cir. 1970); United States v Lee, 699 F.2d 466 (9th Cir. 1980); Brown v Illinois, 422 U.S. 590 (1975).

B. Upon The Facts Of The Instant Case, a Finding of a Miranda Violation Mandates the Exclusion Of Derivative Evidence

Even if the violation herein is only of the Miranda prophylaxsis, the suppression of the derivative evidence should, nevertheless, be affirmed.

The purposes of the exclusionary rule, particularly as applied to the self-incrimination clause, are furthered by the suppression of the derivative evidence herein. As this Court held in Weeks v United States,

232 U.S. 383, 393 (1914):

> Enforced confessions,...often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts...

The admissibility of the evidence derived from a violation of the Miranda rule, the express purpose of which is to protect those constitutional rights by guiding the conduct of law enforcement officials, would constitute just such a sanction.

The "counter-deterrent" effect of such admissibility is immediately apparent. Arresting officers would have every incentive to question a suspect as to the whereabouts of derivative evidence before administering pre-interrogation warnings, particularly where they had reason to believe that such evidence, by virtue of its location or other characteristics, would readily be connected to a suspect.

This issue has been considered in

a variety of lower courts which have held that the fruits of an improper custodial interrogation must be suppressed. See United States v Downing, 665 F.2d 404 (1st Cir. 1981); Parker v Estelle, supra; Commonwealth v White, 374 Mass. 132 (1977), aff'd by an equally divided court, 439 U.S. 280.

In Miranda this Court held that "[u]nless and until such warnings and waiver are demonstrated by the prosectuion at trial, no evidence obtained as a result of interrogation can be used against" a defendant (384 U.S. at 480). This Court has since determined that such language should not be read to mandate exclusion "in every conceivable context". Michigan v Tucker, 417 U.S. at 452; Harris v New York, 401 U.S. 222 (1971). This Court has never suggested, however, that Miranda can be interpreted to mean less than that evidence obtained solely as a direct result of custodial interrogation of a suspect conducted without the required warnings cannot

be used to convict that suspect.

Petitioner proposes that this Court adopt a "good faith" rationale for the admissibility of derivative evidence impermissibly obtained. The argument is not supported by the record, not founded in the law, and would be unworkable in application.

The "good faith" of the arresting officer herein is, at best, an open question, since no one raised the issue prior to the petition in this Court.[14] This Court has made it clear, however, that the protections afforded by the Miranda decision

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14 At the suppression hearing, no one inquired of the officers' motives. The officer's characterization of his activities, though somewhat ambiguous, suggests the possibility that his purpose may indeed have been investigatory: "When I didn't come up with the gun is when I asked him where- when I started to question him". (34a)

should not turn on subjective considerations:

> the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. Rhode Island v Innis, 446 U.S. at 302.

Petitioner's reliance on Michigan v Tucker in this respect is misplaced. The aspect of the officer's good faith upon which the application of the exclusionary rule in Tucker turned, was not the subjective intent of the officer, but his complete compliance with the then prevailing procedures. In the instant case, the arresting officer failed entirely to comply with the procedures mandated by this Court. Whatever the officer's subjective intent, he did not display the sort of good faith which concerned this Court in Tucker.

Petitioner and amicus rely heavily on Tucker as authority for the proposition that any violation of the

Miranda requirement requires only the suppression of a particular statement elicited as opposed to derivative evidence. In Tucker, however, this Court expressly declined to create such a rule.

> Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the Miranda rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground. 417 U.S. at 448

The narrow ground upon which the Tucker holding rests is not present in the instant case, and the rationale for that holding, as well as this Court's generally held principals, mandate the suppression of the derivative evidence on the facts here presented:

> We consider it significant to our decision in this case that the officer's failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda....for at the time respondent was questioned, these police officers

> were guided, quite rightly by the principals established in Escobedo v Illinois, 378 U.S. 478 (1964)...(ibid).

The timing of the interrogation is crucial in light of one of the principal purposes the exclusionary rule has been held to serve: the deterrence of police misconduct. Clearly, where the behavior of the officers involved is entirely in keeping with the standards for such behavior established by this Court, the exclusion of evidence obtained as a result of such conduct, on the basis of an intervening decision, can serve no deterrent purpose. This major element of the Tucker holding is entirely absent in this case, where the police conduct was entirely inconsistent with well-established and uniformly known standards.

Another significant factor in the Tucker decision, was the nature of both the initial admission and the derivative evidence:

> more important, the respondent did not accuse himself. The evidence

> which the prosecution successfully sought to introduce was not a confession of guilt by respondent or indeed even an exculpatory statement by respondent, but rather the testimony of a third party who was subjected to no custodial pressure." 417 U.S. at 450.

On this ground the instant case is most unlike Tucker. The admission elicited by the officer's misconduct was directly incriminating. The derivative evidence was conclusively incriminating, and so closely related to the initial admission as to be virtually indistinguishable from it. The volition of a live witness may well distinguish such derivative evidence from the "non-testimonial" evidence in the case at bar. United States v Ceccolini, 435 U.S. 268 (1978).

Petitioner and amicus implicitly urge upon this Court a two-tiered analysis of Miranda violations. Courts considering Miranda issues would first have to determine whether there had been a custodial interroga-

tion which was not preceded by adequate warnings, and upon such a finding, suppress statements made in answer to that interrogation. A second inquiry would then have to commence for a determination of the good faith of the officer, in the petitioner's formulation, or the lack of actual compulsion, as amicus would have it. Upon a finding of such good faith, or lack of actual compulsion, the content of the suppressed statements, that is the location or existence of the derivative non-testimonial evidence, would by admissible.

Though neither petitioner nor amicus has addressed the questions of burden and standards of proof with respect to this secondary showing, it is clear that an adoption of either's theory in this case would be tantamount to a ruling that the prosecution need not make any showing or meet any standard with respect thereto.

In addition, the application of the novel theories of petitioner and

amicus in this case would mark a significant diminution of the protection afforded citizens not only under Miranda v Arizona, but under the self-incrimination clause, and announce that though the government may not be allowed at trial to specify the source of their information, a citizen may now become the "deluded instrument of his own conviction".

POINT IV

THE DOCTRINE OF INEVITABLE DISCOVERY DOES NOT IN THE CIRCUMSTANCES OF THE INSTANT CASE, RENDER THE IMPROPERLY OBTAINED GUN ADMISSIBLE

The doctrine of "inevitable discovery" was not preserved for appeal in the case at bar, since it was not raised at the suppression hearing. Although the petitioner attempted to raise the issue on appeal, it was not passed upon below by reason of New York's issue preservation rule, and may not now be argued by petitioner. The preservation doctrine constitutes an adequate and independent state ground for the decision rendered by the Court of

Appeals and that decision should therefore not be disturbed.

The New York courts never made findings of fact with respect to whether the gun would have been inevitably discovered nor were the courts called upon to consider whether petitioner met any requisite burden of proof with regard thereto. The inadequacy of the record makes application of this doctrine, upon which this Court has not yet passed, particularly inappropriate in the case at bar.

A. The Doctrine Of Inevitable Discovery Was Not Preserved For Appeal

New York's well settled rule with respect to the preservation and preclusion of issues in the suppression context has been consistently applied in the case at bar. By reason of its failure to raise questions of inevitable discovery at the suppression hearing, the petitioner waived the consideration of such questions at all subsequent stages of the action.

At the suppression hearing, petitioner had ample opportunity to raise the issues related to inevitable discovery, to adduce testimony relevant to the determination of those issues, and to present argument to the fact finder, but failed to do so (36a-37a). Under New York law, where, at a suppression hearing a party fails to raise a particular issue which the trial judge would be called upon to determine, that issue is not preserved for appeal. People v Tutt, 38 N.Y.2d 1011 (1976); People v Martin, 50 N.Y.2d 1029 (1980). The rule enables opposing party to meet and develop at the hearing the appropriate facts and testimony. People v Booker, 49 N.Y.2d 989 (1980); People v Harris, 79 AD2d 615 (2d Dept. 1980); Rentways, Inc. v O'Neill Milk & Cream Co., 308 NY 342, 349 (1955). See also, Criminal Procedure Law §470.05. Petitioner's failure to offer proof regarding inevitable discovery deprived the hearing court of the opportunity to make findings of fact

on relevant questions and deprived respondent of the opportunity to rebut such proof. As a consequence, no record existed upon which the appellate courts could consider the issue.[16]

On appeal to the Appellate Division, the petitioner first raised the inevitable discovery issue. Respondent argued that petitioner had waived the issue, and the Appellate Division affirmed without opinion. That court has fact-finding authority and could have ruled on the inevitable discovery question, "in the interests of justice", but did not do so. The

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16 Under New York law, "great deference" is extended to the determination of the trial court at a suppression hearing, and the appellate court is bound by that determination unless it is unsupported as a matter of law. People v Pooler, 41 A.D.2d 1011 (3d Dept. 1973) aff'd 34 NY2d 772.

Court of Appeals was therefore without jurisdiction to consider the question at all. See People v Ermo, 47 N.Y.2d 863, 865 (1979) (concurrence).

The rejection of the inevitable discovery argument by the appellate courts, sub silentio, can be attributed solely to the failure of the petitioner to preserve the issue for review, since New York has recognized the inevitable discovery doctrine. See People v Fitzpatrick, 32 NY2d 499 (1973), cert. den. 414 U.S. 1050. The argument should also be rejected by this Court.

In Daniels v Allen, supra, 344 U.S. at 458, this Court made it clear that where a "state court judgment rested on reasonable application of the state's legitimate procedural rules" direct review of the federal claims of the petitioner would be barred. See also, Stone v Powell, 428 U.S. 465, 476-7 (1976). This Court has consistently held that where "the highest state court has failed to pass

upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary" Street v New York, 394 U.S. 576, 582 (1969).

As a minimum condition precedent to this Court's review, "there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law" Webb v Webb, supra, 451 U.S. at 501.

The rationale of Webb v Webb, which contains the principles underlying New York's preservation doctrine itself, should clearly be applied to the case at bar.

B. The Doctrine of Inevitable Discovery Should Not Be Applied In This Case

As has been set forth above,

neither the testimony of the arresting officer nor the findings rendered by any court below, contain any reference to the possibility that absent the primary illegality the gun itself would have been recovered. The failure of the petitioner to go forward with respect to an inevitable discovery issue from the outset, has, in addition to the procedural ramifications discussed above, made any meaningful review of the rectitude of the doctrine's application in this case impossible. In short, whether or not this Court chooses to recognize the doctrine, and regardless of the standard which this Court may ultimately deem to be required in such situations, the petitioner cannot be said to have met any burden of proof at all with respect to the inevitable

discovery issue.[17]

The inevitable discovery doctrine provides for the admission of evidence upon a showing that had the illegal source of that evidence not been used, the evidence would have, in any event, been found. It is thus an independent source exception to the inadmissibility of poisoned fruit. People v Fitzpatrick, supra. Justice White, in his dissent to the denial of the writ in Fitzpatrick pointed out that the doctrine is arguably at odds with the prior decisions of this Court,

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17 The issue of whether inevitable discovery should be adopted at all is more fully argued in the case of Nix v Williams now before this Court. Respondent has not yet received a copy of the brief by respondent in that case and reserves his right to join in that argument to the extent that it involves issues similar to those represented herein.

since it is by no means clear that the rationale of Wong Sun can be extended to encompass a hypothetical, as opposed to actual, independent source. 414 U.S. at 1051. While this Court has never reached the issue, it is clear that if improperly obtained evidence is to be admitted despite the exclusionary rule on the basis of the hypothesis that the evidence would have been discovered, there must, at the very least, be a factual showing by the prosecution on which to base the hypothesis. "Inevitable discovery" should be applied, if at all, only where the facts warranting its application have been adduced at trial. The doctrine should not be adopted in this case, which would necessarily eliminate the burden of the prosecution in going forward to prove the admissibility of the evidence in question.

The vast majority of the decisions applying the inevitable discovery doctrine rest on the holding that the

unwarranted speculation which is the greatest danger posed by the doctrine can be avoided by imposing upon the prosecution the burden of proving that the derivative evidence in question would have been discovered in the absence of the primary illegality and by reason of the police procedures which would have been employed in the circumstances or had, prior to the illegality, already been employed. See, e.g., United States v Bienvenue, 632 F2d 910 (1st Cir. 1980); United States v Fisher, 700 F2d 780 (2nd Cir. 1983); Government of the Virgin Islands v Gereau, 502 F2d 914 (3rd Cir. 1974) cert. den. 424 U.S. 917; United States ex rel Owens v Twomey, 508 F2d 858 (7th Cir. 1974); United States v Apker, 705 F2d 293 (8th Cir.1983).

This generally argued rationale was stated in United States v Brookins, 614 F2d 1037, 1048 (5th Cir. 1980) wherein the court held that the application of the inevitable

discovery doctrine:

> The mere assertion of inevitable discovery must fail...police must show that when the illegality occurred [the police] possessed and were actively pursuing the evidence or leads that would have lead to the discovery of the challenged witness and that there was a reasonable probability that the witness would have thereby been discovered. The prosecution must bear the burden of proof on this issue. Maguire, supra at 315; See Brown v Illinois, 422 U.S.590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). The court then must find reasonable probability of subsequent discovery existed based on this showing and the record generally.

The same rationale applies to physical evidence (See Government of Virgin Islands v Gereau, supra) and may be even more stringent in that the exercise of volition which may constitute some portion of an "independent source" determination, cannot be present. See also, United States v Ceccolini, 435 U.S. 268 (1978).

The state's heavy burden on an inevitable discovery showing is also a

clear component of that doctrine under New York law. Thus, in People v Fitzpatrick, supra, 32 NY2d at 508, the Court of Appeals held that:

> the exception may be safely applied and erosion of the salutory exclusionary rule avoided - as long as the prosecution has the burden of proving that the illegal act was not a sine qua non of the discovery of the otherwise tainted evidence.

In Brewer v Williams, 430 U.S. 387 (1977), this Court indicated that the inevitable discovery doctrine may be an exception to the exclusionary rule (see 430 U.S. at p.407 n.12) The Court, this term, granted certiorari in the case of Nix v Williams, supra, which presents the precise question. A comparison of the record and arguments of the United States in Nix and in this case reveals a marked contrast as to the factual sufficiency and legal arguments applicable to the inevitable discovery doctrine, and makes clear the dangers of such a doctrine were it applied herein.

The United States has, in their brief submitted herein, incorporated by reference their brief as amicus in Nix v Williams. (Am.Br. 29) Throughout the Nix brief the prosecution's evidentiary showing is held up as a cure for any infirmities the doctrine suffers. Amicus repeatedly emphasizes in that brief that placing an affirmative burden upon the state to prove that the evidence would have been uncovered, notwithstanding the illegality, would prevent the doctrine of inevitable discovery from being abused. Thus, amicus contends:

> So long as the government is held to a sufficiently strict substantive standard of proof, courts are fully capable of preventing abuse of the doctrine....The prosecution must show the challenged evidence would have been discovered in any event, and not merely that it 'might have' or 'could have' been discovered. (Am.Br. in Nix 8.)

Throughout the brief in Nix, the amicus assures this Court that "the danger of unwarranted speculation can be adequately controlled" if the

prosecution bears the burden of showing by a preponderance that the evidence would have been discovered (id at 7-8) and that "insuring that the government does not profit from the initial illegality can be accomplished by holding the government to a strict standard of proof in inevitable discovery cases" (id. at 20-21).

In the instant case, however, when confronted with a record devoid of any factual showing as to what efforts the police would have made to uncover the gun and without any reference to a burden of proof, the amicus bends its own proposed rule and succumbs to the very speculation against which it warned in Nix.

In this case amicus urges this Court to apply the inevitable discovery doctrine "[a]lthough the lower courts made no findings of fact on the subject..." (Am.Br. 30 n.10) and although there was no proof of what investigatory procedures the police would have undertaken. Amicus employs conclusions such as "undoubtedly",

"presumably" and "virtually inconceivable" with regard to what would have happened to the gun as substitutes for the missing facts (id). Nowhere in this argument does amicus ever suggest that the state has a burden of proof.

The willingness of amicus to disregard in this case the rules it argues in Nix raises a substantial doubt whether abuse of the doctrine of inevitable discovery can be prevented.

By contrast, the record in the Nix v Williams case (at least as appears from the summary thereof in the amicus brief) contains a detailed factual inquiry and finding with respect to the investigatory procedures under way. If this Court is, for the first time, to address the issue of inevitable discovery as a possible exception to the exclusionary rule, it is submitted that it should not be done in this case, where the record furnishes no basis for an informed analysis of two crucial and unsettled

issues: the necessary factual content of the showing and the applicable standard of proof.[18]

A finding of inevitable discovery in this case would immediately establish a rule without the requirement that the state bear an affirmative burden of establishing the factual predicate that the evidence would have been found. In view of the insufficiency of the record and the existing adequate state grounds, it is submitted that this Court should not adopt an "inevitable discovery" exception in this case.

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18 In Brewer v Williams, the court specifically cautioned that under any rule of inevitable discovery, "...it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted" 340 U.S. at 407 n.12. In this case, however, because of the failure of petitioner to present the issue the state courts did not do so.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted,

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No. 82-1213

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IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK,

Petitioner,

against

BENJAMIN QUARLES,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

POINT ONE

All of the Issues Raised by the Petitioner Are Properly Before This Court [Answering Respondent's Point I, p. 37; Point II, pp. 45-55; and Point III, pp. 76-81].

The respondent contends that several of the issues raised by the petitioner are not properly before this Court because there are independent and adequate state grounds for the decision of the Nw York Court of Appeals and be-

cause this Court lacks an adequate record on which to decide the case. We submit that he is incorrect in both regards.

At the outset, it should be noted that the only contention regarding the reviewability of the questions presented in the respondent's brief in opposition to the petition for a writ of *certiorari* was the assertion that the State failed to preserve for review the argument that his gun would inevitably have been discovered even if he had not indicated its location. Since Rule 40(d)(2) of this Court provides that briefs on the merits "may not raise additional questions or change the substance of the questions already presented," any other question regarding the reviewability of the State's claims should not be considered by the Court.

Quite apart from the respondent's failure to previously raise the contentions, however, we submit that they are without merit.

A. There Are No Adequate and Independent State Grounds for the Decision of the Court Below.

Respondent recognizes that this Court has recently held in *Michigan* v. *Long*, —— U.S. ——, 103 S. Ct. 3469, 3476 (1983) that when "a state court decision fairly appears to rest on federal law, or to be interwoven with the federal law" the Court will "accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so" unless "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." Respondent attempts to distinguish *Long*, however, on the ground that, in the

instant case, "the state court opinions below make no reference to the authority for excluding the primary or derivative evidence and do not invoke any federal law with respect thereto" (brief, p. 54). In fact, however, the Court of Appeals specifically based its determination that the lower court had properly suppressed both the defendant's statement and his gun on its opinion that he had not "been given the pre-interrogation warnings to which he was constitutionally entitled" (52a).* Since it has never been held as a matter of New York State constitutional law that a defendant is entitled to pre-interrogation warnings, this could only have been a reference to this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and to the Fifth and Fourteenth Amendments to the United States Constitution. Any remaining ambiguities regarding the federal basis of the decision of the Court of Appeals can be resolved by reference to the dissenting opinion which specified *Miranda* as that basis (54a), the decision of the hearing court, which also specified *Miranda* as its basis (43a), and the defendant's initial motion papers which requested "a hearing to determine whether or not the admission made by defendant was voluntary and whether the weapon seized thereby was properly obtained under the Constitution of the United States" (8a). The defendant's citation of New York statutes authorizing motions to suppress statements and derivative physical evidence (brief, pp. 52-54) as the bases of the Court of Appeals decision in this case [New York Criminal Procedure Law Sections 710.20(1); 710.20 (3); 710.20(4); 60.45] is erroneous both because these are procedural sections not designed to confer substantive rights and because the Court nowhere mentioned them in its opinion.

* Numerical references are to pages of the joint appendix.

Since the decision of the Court of Appeals "fairly appears to rest on federal law, or to be interwoven with the federal law" (*Michigan* v. *Long, supra,* 103 S. Ct. at 3476), it was incumbent upon that Court to make clear its reliance on any independent and adequate state ground. The only portion of the Court's opinion subject to that interpretation, however, is its comment that "so far as appears from the record" the State did not advance at the suppression hearing the theory that there were exigent circumstances posing a risk to the public safety at the time of the questions about the location of the gun (52a). Respondent contends that this amounts to a holding that no determination could be made with regard to the claim and that this holding constitutes an independent and adequate state ground for the Court's decision (brief, p. 37). However, the Court had already made a determination of this question in the preceding sentence, stating that "there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern" (52a). It is this determination—that no exigent circumstances were established—which the State is now asking this Court to review. (See the Petition for a Writ of *Certiorari,* pp. 1, 4, 8-9.)

B. The Record Is Sufficient for This Court to Determine the Issues Presented.

In the court below, the State sufficiently pressed each of the questions presented to enable this Court to reach a determination of them. By opposing the respondent's motion to suppress statements and physical evidence, the State implicitly asserted both that the statements were admissible

and that, in any event, the derivative physical evidence need not be suppressed. From the first appellate level on, the State has explicitly argued both that the defendant's statement, "The gun is over there," was properly elicited and that, even if it be determined that it was not, the gun need not be suppressed as a fruit of that violation because it would have inevitably been discovered absent that statement. Thus, respondent's repeated assertion that the State never raised the issue of the admissibility of derivative evidence notwithstanding a *Miranda* violation is simply erroneous (brief, pp. 45, 47, 55). The only argument added in this Court has been that the derivative evidence is admissible on the authority of *Michigan* v. *Tucker*, 417 U.S. 433 (1974), because the defendant's statement was voluntary, the police officer acted in good faith, and the detriments of exclusion outweigh the benefits (Brief for the Petitioner, Point IIA). This argument merely provides another reason why *Miranda* should not be held to require exclusion of the derivative evidence in the case at bar. As this Court held in *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1898), "Parties are not confined here to the same arguments which were advanced in the court below upon a Federal question there discussed." Respondent's citation of *Illinois* v. *Gates*, —— U.S. ——, 103 S. Ct. 2317 (1983) in this regard (brief, pp. 46-50, 55) is inapposite inasmuch as in *Gates*, the issue of the scope of the exclusionary rule, as distinct from the issue of whether a constitutional violation had occurred, had never been raised in the State court system at all (*id.* at 2323). [*Cf. Webb* v. *Webb*, 451 U.S. 493 (1981).]

The record of the instant case fully supports our position on each issue raised. If this Court determines that the

record is insufficient to support our position, it should decide the issues against us on the merits since it is our burden to establish that the defendant's statements were voluntary or that the derivative evidence was admissible notwithstanding any *Miranda* violation. There is simply no reason for this Court not to decide the issues presented.

POINT TWO

Admission of Evidence of the Defendant's Declaration Concerning the Location of His Revolver Would Be Consistent With Previous Decisions of This Court [Answering Respondent's Point I, pp. 15-44].

In its brief for the petitioner, the State argued that the New York Court of Appeals improperly excluded evidence of the defendant's statement, "The gun is over there," as being elicited in violation of his federal constitutional rights where the police had probable cause to believe that he had just committed an armed felony and disposed of the gun in the immediate vicinity of where he was standing in a supermarket. Respondent now contends that such a holding would "abrogate" *Miranda* v. *Arizona, supra,* upset the clarity of the objective tests for determining whether a person is subjected to interrogation which are set forth in *Miranda* and *Rhode Island* v. *Innis,* 446 U.S. 291 (1980), and overrule *Orozco* v. *Texas,* 394 U.S. 324 (1969) (brief, pp. 18, 26, 31, 38). We submit that it would do none of these things.

Miranda exempted from its definition of custodial interrogation "general on the scene questioning as to facts surrounding a crime" (384 U.S. at 477). While *Miranda*

left open the issue of whether questions asked of a person in custody can constitute such on-scene questioning, numerous subsequent cases have held that they can (see Brief for the Petitioner, pp. 13-14). Specifically, questions concerning the presence of weapons in the immediate vicinity of a police-citizen encounter have almost always been held not to constitute interrogation under *Miranda*, both because they are considered non-investigatory in nature and because they are reasonably prudent measures to neutralize the threat of physical harm to either the police officer or others present (Brief for the Petitioner, pp. 14-15). To decide the instant case consistently with those referred to would be neither an abrogation of the holding of *Miranda* nor an obfuscation of its reasoning. Rather, it would be a reasonable interpretation of the meaning of that case.

Conceding that there are some circumstances which "may justify a different result" from that which he believes should obtain in the instant case, respondent attempts to distinguish some of those cases where "a different result" was, in fact, reached (brief, p. 35). For example, he attempts to distinguish *United States* v. *Castellana*, 500 F.2d 325 (5th Cir. 1974) on the ground that the defendant in that case had not been restrained at the time of the question about the gun. He ignores, however, both that in that case the question was considered proper despite a specific finding that the officers had not felt physically threatened and that the arrest had taken place in an apartment where the danger of harm to either the officer or the public was less than in a building open to the public such as a supermarket (*id.* at 326-27). Similarly, he attempts to distinguish both *State* v. *Levy*, 229 So.2d 220 (La. 1979) and *Pope* v. *State*, 478 P.2d 801 (Alaska 1977) on the ground that the questioning

occurred "before effectuating an arrest" despite the fact that both cases made clear that the questions concerning the locations of the weapons did not constitute interrogation regardless of the degree of control exerted by the police. Respondent's difficulty in distinguishing these cases stems from his failure to recognize their common thread—that a question regarding the location of a weapon in the immediate vicinity of a police-citizen encounter is, objectively speaking, a reasonably prudent measure not proscribed by *Miranda*. This thread is seen even more clearly in *United States* v. *Ganter*, 436 F.2d 369, 370 (7th Cir. 1970), *State* v. *Lane*, 467 P.2d 304 (Wash. 1970) and *People* v. *Toler*, 45 Mich. App. 156, 206 N.W.2d 253 (1973), all of which are cited on page 16 of the brief for the petitioner and none of which are discussed in the brief for the respondent. In *Ganter*, the Court found that the defendant "obviously did not have the gun on him at the time of the question as to its location"; in *Lane*, the defendant was handcuffed and surrounded by police officers; and in *Toler*, the defendant had been shot, arrested, and patted down for a weapon. In each case, however, the officer's question was deemed to have been reasonably prudent under the circumstances. Quite obviously, it is the nature of the question, rather than the degree of control exerted by the police which has been deemed dispositive.

After warning that admission of his statement would upset the clarity of *Rhode Island* v. *Innis*, *supra*, respondent proceeds to interpret *Innis* in such a way as to negate any clarity which might have inhered in that decision. It bears repeating at this point that the holding in *Innis* was that, in addition to express questions, the term "interrogation"

under *Miranda* encompasses the "functional equivalent" of express questioning, which was defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (446 U.S. at 361). Respondent first applies the "reasonably likely" standard to an express question (brief, pp. 24-25), despite the plain language of *Innis* to the effect that that was intended to apply only to words or conduct short of express questioning [see, *United States* v. *Hinckley*, 525 F. Supp. 1342, 1355 (D.D.C. 1981), *aff'd* 672 F.2d 115 (1982)]. Second, he equates the phrase "normally attendant to arrest and custody" with "routine administrative questioning" (incorrectly asserting that *amicus* does likewise), and then defines the latter phrase as any question which is not likely to elicit an incriminating response (brief, pp. 27-31). This circular interpretation, of course, renders the parenthetical phrase "other than those normally attendant to arrest and custody" superfluous.

Respondent, then, would interpret *Innis* as holding that any words or conduct on the part of a police officer, without exception, that the police should know are reasonably likely to elicit an incriminating response constitute interrogation under *Miranda*. While benefitting from a superficial clarity, this is simply not the holding of *Innis* as it was written.

In its brief for the petitioner, the State analogized the instant case to *United States* v. *Bennett*, 626 F.2d 1309, 1313 (5th Cir. 1980), *cert. denied*, 449 U.S. 1092 (1981), which held that the statement of one police officer to the other

that "there's a gun in the car" did not constitute interrogation because it was "normally attendant to arrest and custody" of the defendant (brief, p. 12). Respondent attempts to distinguish *Bennett* on the ground that the police officer's statement "was neither questioning nor its functional equivalent" (brief, p. 26, n. 6). While this is true, the *Bennett* court specifically found that the police statement was "normally attendant," and therefore not the functional equivalent of express questioning regardless of whether it was likely to elicit an incriminating response (626 F.2d at 1312).

Respondent also argues that questions about the location of weapons are not normally attendant to arrest and custody because the conversation at issue in *Innis* was about a weapon and the Court did not there decide that the police conduct was "normally attendant" (brief, p. 27). This argument ignores the fact that, in *Innis*, the Court determined that the police conduct was not reasonably likely to elicit an incriminating response. Having made that determination, there was no need to decide the issue of whether it was normally attendant to arrest and custody. For the same reason, the fact that *Innis* did not discuss the safety of the public does not preclude the State from raising that consideration in the instant case, as respondent seems to imply (brief, pp. 37-38).

Orozco v. *Texas*, 394 U.S. 324 (1969) does not require suppression of the evidence in the case at bar. In *Orozco*, the police went to the defendant's house some time after a murder at a restaurant for the purpose of investigating his involvement in the murder (*id.* at 326). Surrounding the defendant, they asked a series of clearly investigatory ques-

tions, only one of which involved a weapon. They had no reason to suspect that the defendant was armed at that moment or that any member of the public was likely to find the weapon. In contrast, in the case at bar, Officer Kraft had reason to believe that the defendant's gun was in the immediate vicinity of where he was standing in the supermarket. Contrary to respondent's contention (brief, p. 14), there is no evidence in the record that the respondent and the officer were alone at the scene of the arrest. Faced with these difficult circumstances, Kraft acted prudently in asking only the single question directed toward the location of the gun prior to issuance of *Miranda* warnings (17a-21a, 34a-36a).

In arguing for a rigid application of *Miranda*, respondent extensively quotes from *Harryman* v. *Estelle*, 616 F.2d 870, 873-874 (5th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 860 (1980). *Harryman*, however, specifically stated that if there is a "sufficiently compelling noninvestigatory purpose" for a question, it would not constitute interrogation under *Miranda*, and it specified the presence of firearms as a question with such a purpose, citing *United States* v. *Castellana*, *supra*. Accordingly, *Harryman* is a good example of how permitting police to question arrestees about the likely presence of a weapon in the immediate vicinity of the arrest is not inconsistent with rigid and zealous protection of the defendant's rights.

Conclusion

For the Reasons Previously Stated It is Respectfully Requested That the Order of the Court of Appeals of the State of New York Be Reversed.

Respectfully submitted,

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No. 82-1213

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE PEOPLE OF THE
STATE OF NEW YORK, PETITIONER

v.

BENJAMIN QUARLES

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether *Miranda* warnings must be given before questioning that is incident to an arrest.

2. Whether nontestimonial evidence derived from an interrogation that violates *Miranda* is admissible in a criminal prosecution.

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INTEREST OF THE UNITED STATES

In our view, the principal question in this case is whether the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), apply to questioning by law enforcement officers that is incident to the arrest of a suspect. The resolution of that question is likely to have a significant impact on the practices of the agencies responsible for enforcing federal criminal laws and on federal criminal law enforcement interests. This case also presents a question concerning the scope of the exclusionary rule established by *Miranda*. Because the resolution of that question will affect the extent to which probative evidence can be used to establish guilt in criminal prosecutions, it is also likely to affect federal criminal law enforcement.

STATEMENT

1. Two police officers on patrol in New York City were approached by a woman who said she had just been raped. She described her assailant as a black man six feet tall

who was wearing a short black jacket with the words "Big Ben" in yellow letters on the back, and she said that the man had gone into a nearby supermarket. She also said that the man had a gun. Pet. App. 2a-3a.

One of the officers called for assistance while the other, Officer Kraft, went to the door of the supermarket. He saw respondent, who matched the woman's description, approaching a checkout counter. Respondent saw Officer Kraft seconds later and fled toward the back of the store, with Officer Kraft in pursuit. Officer Kraft lost sight of respondent for a few seconds but soon located him again, caught up to him, and ordered him to stop and put his hands over his head. By this time, other officers were on the scene and at least four officers surrounded respondent with their guns drawn. Pet. App. 3a; J.A. 17a.

Officer Kraft frisked respondent and discovered that he was wearing an empty shoulder holster. The officer then handcuffed respondent and said to him: "Where is the gun?" Respondent looked toward some cartons nearby and said: "The gun is over there." Officer Kraft looked through the cartons briefly and found a loaded .38 caliber revolver. Officer Kraft testified that at the time respondent made the statement indicating the location of the gun, the other officers no longer had their weapons drawn. Pet. App. 3a; J.A. 18a, 34a-36a.

After securing respondent's gun, Officer Kraft told respondent he was under arrest and read him the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Respondent said that he would be willing to answer questions without an attorney present. Officer Kraft asked respondent if he owned the gun, and respondent said that he did; he asked respondent where he had bought it, and respondent said "Miami, Florida." Pet. App. 3a; J.A. 20a-21a.

2. Respondent was indicted for illegal possession of a weapon. Before trial, he moved to suppress the gun and all of his statements to Officer Kraft. The trial court, after holding a hearing, granted the motion. Pet. App. 2a-5a. The court held that the statement identifying the

location of the gun had to be suppressed because at the time respondent made that statement he was "in custody or arrested within the meaning of *Miranda*" (*id.* at 4a) and was not given the warnings required by that case. The court then asserted that the gun was to be suppressed as the fruit of the statement and held that the statements made after respondent received *Miranda* warnings were "tainted by the previous seizure of the weapon and the statement [made] without the warnings" (*id.* at 5a).

By a vote of 4-3, the New York Court of Appeals affirmed. Pet. App. 6a-14a.[1] The Court of Appeals agreed with the trial court that respondent's "response to the police interrogation occurred while he was in custody, before he had been given the pre-interrogation warnings to which he was constitutionally entitled" (*id.* at 7a). The Court of Appeals also affirmed, without discussion, the suppression of the gun and respondent's other statements as the fruit of respondent's initial statement. *Ibid.* The court asserted that "there is no evidence * * * that there were exigent circumstances posing a risk to public safety or that the police interrogation was prompted by any such concern" and that it therefore would not decide whether "an emergency exception" to what it saw as the requirements of *Miranda* "might be recognized if the purpose of the police inquiry had been to locate and to confiscate the gun for the protection of the public as distinguished from the[] desire to obtain evidence of criminal activity on the part of [respondent.]" *Ibid.*

Judge Wachtler dissented. He stated that the officers had "responded to an emergency situation in an entirely reasonable manner" (Pet. App. 9a). Judge Wachtler reasoned that *Miranda* and other decisions regulating custodial interrogation are "primarily concerned with discouraging official conduct which, examined objectively, reveals an unmistakably deliberate attempt to elicit some incriminating response from the detainee as opposed to official

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[1] An intermediate appellate court had affirmed the trial court's ruling without opinion. See Pet. App. 10a.

conduct designed to achieve an articulable and legitimate non-investigatory purpose." *Id.* at 11a. In this case, the dissenters explained, "[f]ar from revealing a deliberate design on the part of the officer to elicit an incriminating statement from [respondent], the record * * * portrays a prudent measure undertaken to neutralize the very real threat of possible physical harm which could result from a weapon being at large." *Id.* at 13a-14a.

Judge Wachtler further stated that "[t]o require a police officer to provide *Miranda* warnings before asking about the location of a weapon under the circumstances of this case would only unnecessarily enhance the potential for death or severe injury" (Pet. App. 13a). He reasoned that "the loaded weapon here could have been passed to a cohort, an accomplice bent on securing the freedom of his captured ally, or, worse yet, dropped on the street outside the supermarket to become the weapon of an innocent child, a mentally unstable adult, or anyone else who might decide to use it." *Ibid.* For these reasons, Judge Wachtler concluded, "[a]ny result which discourages the police from pursuing this type of precautionary measure by requiring *Miranda* warnings beforehand * * * is contrary to reason" (*id.* at 14a).

SUMMARY OF ARGUMENT

I. Officer Kraft's question about the location of the gun is properly viewed as incident to the arrest of respondent. The process of arresting a suspect—which can be distinguished, with reasonable clarity, from subsequent investigative efforts to obtain statements from the suspect for use as evidence against him—is clearly not complete when the suspect is placed under restraint. As the Court has recognized in cases dealing with searches incident to arrest, the process of arresting a suspect must also include, among other things, ensuring that any weapons to which the suspect might have access cannot be used to harm the arresting officers or frustrate the arrest.

We submit that *Miranda* warnings need not be given before questioning that is incident to an arrest, even if the questioning could produce an inculpatory response. See *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980) (*Miranda* warnings need not accompany "words or actions * * * normally attendant to arrest and custody"). We recognize that the *Miranda* rules should be kept relatively clear and easy to apply, but the distinction between actions incident to arrest and subsequent investigatory actions is familiar from the Fourth Amendment context, and it is, if anything, less difficult to apply than other distinctions law enforcement officers currently use in deciding whether *Miranda* warnings must be given.

The Court of Appeals apparently believed that Officer Kraft had to warn respondent because respondent was "in custody." It is true that respondent was in custody in the sense that he had been seized within the meaning of the Fourth Amendment, but a Fourth Amendment seizure should not be equated with "custody" as *Miranda* uses that term. A Fourth Amendment seizure, while a necessary condition of requiring *Miranda* warnings, is not a sufficient reason to require warnings. *Miranda* was concerned with the kind of "custody" that compels suspects to speak, and not every form of custody has that effect. In particular, questioning incident to an arrest does not present the dangers of coercion that *Miranda* warnings are designed to dispel, because an arrest scene in the few moments following an arrest does not resemble the "interrogation environment"—in which persistent, psychologically coercive questioning can compel a suspect to speak—for which *Miranda* warnings are designed.

Specifically, a principal cause of the psychological coercion that concerned the *Miranda* Court is a suspect's perception that interrogation will persist indefinitely until he satisfies his interrogator. Questioning incident to an arrest conveys no such message to a suspect; such questioning will necessarily be brief, and it will concern subjects that the arresting officer obviously is seeking to resolve quickly for his own safety or because he wishes to

complete the arrest successfully. Similarly, *Miranda* was concerned with the impact of an environment that the interrogating officers could manipulate to compel a suspect to speak; arresting officers will seldom have that degree of control over the scene of an arrest. Of course, the fact of being arrested might itself prompt a suspect to speak. But the Self-Incrimination Clause bars only compulsion, not every official act that may produce an incriminating admission. Nothing in the Constitution requires officers to discourage impulsive or improvident statements, so long as they are made voluntarily.

We recognize that, amid the show of force that often accompanies an arrest, a suspect will sometimes be coerced into speaking. But the *Miranda* rules are not the appropriate remedy for such coercion. *Miranda* warnings were designed to dispel the coercion that can be generated by prolonged incommunicado interrogation; they will not generally be useful in preventing coercion of the kind that is likely to arise at an arrest scene. That kind of coercion can be dealt with by the traditional inquiry into the voluntariness of the statement. Moreover, events at an arrest scene will be relatively easy to reconstruct; as the *Miranda* Court emphasized, a principal reason for the *Miranda* exclusionary rule is the difficulty of determining what occurred during a prolonged and manipulative incommunicado interrogation.

Miranda established a presumption, rebuttable only by a showing that a suspect waived his rights after proper warnings, that questioning in certain custodial circumstances is coercive. But such a presumption is unreasonable and unjustified in contexts where there is little danger of unprovable coercion of the kind identified by *Miranda*. The costs of applying *Miranda* to questioning incident to an arrest are substantial: probative statements that were in fact voluntarily given will be suppressed; suspects will be discouraged from speaking voluntarily; and police officers may be forced to choose between jeopardizing the successful completion of an arrest and jeopardizing the admission of probative evidence. The

slight possible benefits to the values underlying the Self-Incrimination Clause that might be gained from applying *Miranda* to questioning incident to an arrest do not warrant incurring these costs.

II. Even if *Miranda* requires the suppression of respondent's statement identifying the location of the gun, it does not follow that the State cannot introduce the gun itself, assuming it can independently link it to respondent.

The Court has not resolved the question whether nontestimonial fruits of a *Miranda* violation may be used as evidence. By its terms, the Self-Incrimination Clause applies only to compelled statements, not to nontestimonial evidence. When nontestimonial evidence is the fruit of statements that are not shown to have been compelled, but are excluded only because they were obtained in violation of the prophylactic rule of *Miranda*, the possibility that the nontestimonial evidence derived from a compelled statement is too remote to warrant its exclusion. Moreover, the specific values that this Court has identified as the basis of the privilege against self-incrimination are not served by excluding such evidence.

In addition, evidence that is derived from a *Miranda* violation, but would have been discovered by the authorities, even in the absence of a *Miranda* violation, should not be excluded. In this case, it seems clear that the gun would inevitably have been discovered by the officers even if respondent had not made his statement.

ARGUMENT

I. *MIRANDA* WARNINGS NEED NOT BE GIVEN BEFORE QUESTIONING THAT IS INCIDENT TO AN ARREST

Officer Kraft's actions were manifestly reasonable; surely few police officers in his situation would—or should—have stopped to give *Miranda* warnings before asking respondent where the gun was. As the dissenting opinion in the Court of Appeals pointed out, to do so might have

endangered the officers themselves or innocent bystanders. Nor is there any suggestion that Officer Kraft's questioning was threatening, abusive, or oppressive in any way.

The Court of Appeals nonetheless ordered that the evidence obtained as a result of Officer Kraft's question be suppressed. The only constitutional provision underlying the court's holding is the Self-Incrimination Clause of the Fifth Amendment, but the Court of Appeals did not suggest that respondent's statement was in fact coerced or compelled in a way that the Self-Incrimination Clause forbids. That is, the court did not suggest that the Self-Incrimination Clause, of its own force, forbade the use of the statement respondent made in response to Officer Kraft's reasonable and legitimate question. Instead, the court suppressed respondent's statement because, it believed, Officer Kraft did not comply with the "prophylactic standards" established by *Miranda* (*Michigan* v. *Tucker*, 417 U.S. 433, 446 (1974))—standards that are "not themselves rights protected by the Constitution" (*id.* at 444) but are intended to safeguard a suspect's rights under the Self-Incrimination Clause.

It is the nature of the *Miranda* prophylactic rules that sometimes, in particular cases, they will require the suppression of statements that are not in fact "compelled" within the meaning of the Self-Incrimination Clause. See *Michigan* v. *Tucker*, *supra*, 417 U.S. at 445-447; *Michigan* v. *Payne*, 412 U.S. 47, 53 (1973); *Johnson* v. *New Jersey*, 384 U.S. 719, 730 (1966); *Miranda*, 384 U.S. at 457. The importance of having a relatively clear and definite rule, and the difficulty of detecting every instance of compulsion on a case-by-case basis, are thought to justify such a result. But if the *Miranda* rules can be defined in a way that, while not materially diminishing their clarity or reducing the protection they afford to constitutional values, also does not produce anomalous results that damage important societal interests, such a construction is obviously preferable.

In our view, the Court of Appeals erred in assuming that *Miranda* required warnings to accompany all ques-

tioning that occurred after respondent was surrounded by police officers. In *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), the Court took care to specify that *Miranda* warnings are not required before the police utter words or take actions "normally attendant to arrest and custody" (*id.* at 301). We submit that questions that are asked incident to the arrest of a suspect do not constitute interrogation of a kind to which *Miranda* applies. We do not suggest, of course, that all questions asked at the scene of an arrest should be regarded as incident to the arrest. See *Orozco* v. *Texas*, 394 U.S. 324 (1969). Rather, arresting a suspect is a discrete process, relatively easy to distinguish from subsequent efforts to gather testimonial evidence from the suspect. When questions are asked as a legitimate part of the process of completing an arrest, the dangers of coercion with which *Miranda* was concerned are ordinarily not likely to be present. For that reason, such qustions need not be preceded by *Miranda* warnings.

A. A Question, Asked at the Scene of the Arrest and Shortly After the Arrest, About the Location of a Weapon Recently Possessed by the Suspect, Belongs to a Definable Category of Questions That Are Part of the Process of Completing an Arrest

1. The process of arresting a suspect consists of more than the act of placing him under restraint. While we readily acknowledge that respondent's freedom of movement had been restricted when Officer Kraft asked him the location of the gun, it is equally obvious that the process of arresting respondent was not complete at that time. It would have been wholly unrealistic, indeed dangerous, for the officers to have concluded otherwise.

At the very least, the process of arresting a suspect includes measures designed to place the situation at the arrest scene under control, and to ensure that safety of the arresting officers or bystanders will not be threatened and the suspect will not escape. Specifically, as this Court has recognized in dealing with searches incident to ar-

rest, the process of arresting a suspect necessarily comprises steps that are needed "in order to remove any weapons that the [suspect] might seek to use in order to resist arrest or effect his escape" because "[o]therwise, the officer's safety might well be endangered, and the arrest itself frustrated." *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

For this reason, Officer Kraft's question was part of the process of arresting respondent. Officer Kraft had abundant reason to believe that respondent had recently disposed of, or hidden, a gun. As Judge Wachtler pointed out, the gun could have been used to threaten the officers or to aid in an escape attempt. Asking respondent the location of the gun was the most obvious and direct way of ascertaining its location and ensuring that it could not interfere with the arrest or endanger other persons; it also achieved those objectives far more quickly, and with less danger, than any other action that the officers might have taken—such as attempting to search both respondent's person and the surrounding area.

Other questions, besides those designed to determine the location of a weapon, might also be reasonable incidents of an arrest. For example, if the arresting officers in this case believed that respondent had an armed accomplice nearby, a question designed to help find the accomplice would have been as much a part of successfully completing the arrest, and controlling the situation, as a question about the location of a weapon. It is also a reasonable and necessary part of an arrest to ensure that the right person has been apprehended, and arresting officers might ask questions designed to confirm the suspect's identity after they have arrested him on probable cause. In addition, the Court has recognized that securing evidence from the arrest scene that might otherwise be destroyed is part of the process of arresting a suspect (see *Chimel* v. *California*, *supra*, 395 U.S. at 763), and questions de-

signed to ascertain the location of such evidence should be regarded as incident to the arrest.[2]

In general, questioning incident to an arrest can be defined by its subject matter as well as by the time and place at which it occurs. Like a search incident to arrest, it must be roughly contemporaneous with the arrest. See, *e.g.*, *Vale* v. *Louisiana*, 399 U.S. 30, 33 (1970). In subject matter, it must be confined to questions reasonably related to the successful completion of the process of arresting the suspect and placing the arrest scene under control.

2. It will not diminish the clarity of the *Miranda* rules to distinguish between questions asked incident to an arrest and questions asked as part of a subsequent investigative process. To begin with, the clarity of the *Miranda* rules as they are currently applied should not be overstated. *Miranda* warnings are not required unless a suspect is "in custody" (384 U.S. at 477), and—as more than one court of appeals has commented—defining "custody" for *Miranda* purposes has proved to be a difficult and slippery task. See, *e.g.*, *United States* v. *Harris*, 611 F.2d 170, 172 (6th Cir. 1979); *United States* v. *Jimenez*, 602 F.2d 139, 143 (7th Cir. 1979); *United States* v. *Hall*, 421 F.2d 540, 541 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970). There is no clear rule for determining when a suspect is "in custody"; courts have generally concluded that that question can be resolved only on a case-by-case basis by considering a range of circumstances. See, *e.g.*, *United States* v. *Harris*, *supra*, 611 F.2d at 172; *United States* v. *Jimenez*, *supra*, 602 F.2d at 143; *United States* v. *Kennedy*, 573 F.2d 657, 660 (9th Cir. 1978); *United States* v. *Del Soccorro Castro*, 573 F.2d 213, 215 (5th Cir. 1978); *Steigler* v. *Anderson*, 496 F.2d 793, 799-800 (3d Cir.), cert. denied, 419 U.S. 1002 (1974).

In addition, *Miranda* applies only when a suspect is interrogated, and the definition of interrogation—"any

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[2] Compare *Harryman* v. *Estelle*, 616 F.2d 870, 873-875 (5th Cir.) (en banc), cert. denied, 449 U.S. 860 (1980), with *United States* v. *Castellana*, 500 F.2d 325 (5th Cir. 1974) (en banc).

words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (*Rhode Island* v. *Innis*, *supra*, 446 U.S. at 301 (footnotes omitted))—is capable of varying application. Moreover, as that definition suggests, and as the courts of appeals have consistently held, custodial questioning need not be preceded by *Miranda* warnings if it is routine administrative questioning,[3] and disputes can arise over what constitutes routine administrative questioning.

The distinction between actions taken incident to arrest and post-arrest investigative actions is, if anything, easier to apply than these other distinctions that courts and law enforcement officers already use in deciding when *Miranda* warnings are to be given. In the Fourth Amendment area, law enforcement officers must distinguish between a search incident to arrest, which can be conducted without probable cause, and searches that require probable cause and possibly a warrant. Because of the Fourth Amendment exclusionary rule, a mistaken decision about whether a search is correctly characterized as incident to arrest can be fatal to a prosecution. But law enforcement officers apply the "incident to arrest" criterion routinely and without inordinate difficulty.

It is reasonable to expect that officers will have no greater difficulty distinguishing between questioning that is needed to complete an arrest and control the arrest scene, on the one hand, and post-arrest interrogation designed to elicit testimonial evidence from the accused, on

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[3] See, *e.g.*, *United States* v. *Glen-Archila*, 677 F.2d 809, 815 (11th Cir. 1982), cert. denied, No. 82-5178 (Oct. 4, 1982); *United States* v. *Prewitt*, 553 F.2d 1082, 1086 (7th Cir.), cert. denied, 434 U.S. 840 (1977); *United States* v. *Grant*, 549 F.2d 942, 946-947 (4th Cir.), cert. denied, 432 U.S. 908 (1977); *United States ex rel. Hines* v. *LaVallee*, 521 F.2d 1109, 1112-1113 (2d Cir. 1975), cert. denied, 423 U.S. 1090 (1976); *United States* v. *Menichino*, 497 F.2d 935, 939-941 (5th Cir. 1974); *United States* v. *LaMonica*, 472 F.2d 580 (9th Cir. 1972). See also *United States* v. *Hinckley*, 672 F.2d 115, 122-124 (D.C. Cir. 1982).

the other. The police skills involved in the two tasks—arresting a suspect and interrogating him—are significantly different. The police are likely to regard the tasks as quite distinct in the demands they make and the risks they pose. Notably, in this case, Officer Kraft intuitively distinguished between questioning incident to the arrest and the subsequent investigative questioning; he was careful to give *Miranda* warnings before he began the latter kind of questioning.

B. Questioning Incident to an Arrest Does Not Create the Dangers of Coercion With Which *Miranda* Is Concerned

1. a. The *Miranda* Court stated that warnings must accompany "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. But the notion of "custody" has a different meaning in different contexts, and the fact that a suspect may be "in custody" for certain purposes does not necessarily mean that he is "in custody" for *Miranda* purposes. Nor is every restraint on a suspect's freedom of movement "significant" for *Miranda* purposes. Specifically, *Miranda* warnings should not be required in situations that, while "custodial" in some sense, do not present the dangers with which *Miranda* is concerned.

For example, a parolee is "in custody" for purposes of the habeas corpus statutes, 28 U.S.C. 2241 and 2254, and his "freedom of action" is significantly restrained. See *Jones* v. *Cunningham*, 371 U.S. 236, 242-243 (1963) ("[I]n fact, as well as in theory, [parole] * * * involve[s] significant restraints on [a parolee's] liberty * * *. [The] conditions and restrictions [of parole] * * * significantly restrain [the parolee's] liberty * * *. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom * * *."). But the fact that a suspect is on parole does not entitle him to *Miranda* warnings before he is questioned by the police,

even if the questioning is conducted at the request of the police and behind closed doors in a police station. *Oregon* v. *Mathiason*, 429 U.S. 492 (1977).

When Officer Kraft asked respondent the location of the weapon, respondent undoubtedly was "in custody" in the sense that he had been "seized" within the meaning of the Fourth Amendment. But the Fourth Amendment and the *Miranda* rules serve substantially different purposes. See *Brown* v. *Illinois*, 422 U.S. 590, 600-603 (1975). The Fourth Amendment defines the circumstances in which the police may restrain a person's movement at all; *Miranda* is concerned with the quite different problem of averting the "compulsion to speak" (384 U.S. at 461) that, the *Miranda* Court believed, might be created by certain forms of restraint. There is, therefore, simply no reason automatically to equate Fourth Amendment "custody"—that is, a seizure—with the kind of "custody" that makes *Miranda* warnings necessary.

b. *Miranda* was concerned with the kind of custody that is "inherently compelling" (384 U.S. at 467; see *id.* at 458, 465). The compulsion that *Miranda* warnings are designed to dispel is caused by the psychological forces, described in detail in the Court's opinion in *Miranda*, that arise in *certain* custodial settings. See 384 U.S. at 445 ("An understanding of the nature and setting of this in-custody interrogation is essential to our decision[]"). As the *Miranda* opinion makes clear, restraint of the suspect's liberty is necessary to permit these forces to operate, but it is not sufficient, and these forces do not begin to operate the moment a suspect is arrested. Rather, these psychological forces, the Court determined, arise in what the Court repeatedly referred to as an "interrogation environment" or an "interrogation atmosphere." See, *e.g.*, 384 U.S. at 457, 468. See also *Rhode Island* v. *Innis*, *supra*, 446 U.S. at 299. The *Miranda* Court's discussion of the "nature and setting" of the "interrogation atmosphere" shows that questioning incident to an arrest does not occur in such an environment.

Two elements are crucial to the creation of the atmosphere with which *Miranda* was concerned—the danger

that the suspect may perceive that questioning will not cease until he has satisfied his interrogators; and the isolation of the suspect and pervasive police domination and control of the surroundings. The suspect's perception that interrogation might continue indefinitely played a particularly large role in the compulsion that concerned the *Miranda* Court. Indeed, the Court explained that the principal reason for the warning of the right to remain silent is to overcome "an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained" (384 U.S. at 468). The Court described police techniques that strive to create " 'an oppressive atmosphere of dogged persistence' " in which the questioner " 'interrogate[s] steadily and without relent, leaving the subject no prospect of surcease * * * [and] no respite from the atmosphere of domination.' " 384 U.S. at 451 (citation omitted). Coercion is created, the *Miranda* Court explained, when "[p]atience and persistence, at times relentless questioning, are employed" (*id.* at 455) because officers can then use "psychological conditioning" and "deceptive stratagems" (*id.* at 454, 455) to coerce a suspect into speaking.

Crucial to the success of these tactics is the ability of the interrogating officers to manipulate the surroundings so as to further their efforts to break the suspect's will. The coercion that *Miranda* described arises in an "incommunicado police-dominated atmosphere" (384 U.S. at 456) that is "cut off from the outside world" (*id.* at 445; see *id.* at 475), "an interrogation environment * * * created for no purpose other than to subjugate the individual to the will of his examiner" (*id.* at 457).

When questioning is conducted only incident to an arrest, the psychological forces described by the *Miranda* opinion have no opportunity to operate. Such questioning is necessarily brief in duration, because the process of arresting a suspect seldom takes long to complete. The suspect will have no reason to believe that the questioning will persist until he incriminates himself, and the

police will be unable to take advantage of the psychological forces generated by prolonged and relentless questioning. Because the subject matter of questioning incident to arrest is confined to matters that a prudent officer would want to resolve before he considered the arrest complete, no suspect is likely to receive the impression that he is in the presence of a dogged interrogator who will persist until he receives the answer he is seeking.

In addition, questioning at the arrest scene will be most unlikely to take place in an environment deliberately designed and manipulated to coerce the suspect into speaking. Often, as in this case, the arresting officers will have no control whatever over the place in which they arrest a suspect. Where they have some control—if, for example, they go to a suspect's home to arrest him—they will seldom be able to arrange a setting, or create an environment, that serves their purposes to anything approaching the degree *Miranda* envisioned. To the extent the authorities do arrest a suspect in an environment they control completely, they are likely to be able to complete the arrest quickly and with little difficulty, thus diminishing or obviating the need to ask questions incident to the arrest.

We do not suggest that *Miranda* is limited to stationhouse interrogation and has no application to questioning at the arrest scene. See *Orozco* v. *Texas*, *supra*; *Mathis* v. *United States*, 391 U.S. 1 (1968). The reason *Miranda* cannot be so limited is apparent: officers could escape its dictates by, in effect, recreating the coercive aspects of the stationhouse environment at the arrest scene. That is arguably what the officers did in *Orozco*. But where arresting officers have not attempted to create a coercive "interrogation environment" at the arrest scene but have engaged only in brief, reasonable, incident-to-arrest questioning, the concerns that could justify the *Miranda* prophylactic rule are not present.

Of course, forces generated at the time of an arrest will often *induce* a suspect to speak to the police. A suspect's emotional reaction to being arrested may be that

he might as well cooperate since he has nothing more to lose. A person may operate outside the law as long as he can escape detection but become willing to cooperate when he is in the presence of the authorities. He may gain some emotional release from confessing. Or a suspect may, in the sudden rush of events, speak imprudently because he has not stopped to calculate the incriminating effect that his statement will have; that may be the most plausible explanation of respondent's statement in this case.

The Constitution does not, however, require that admissions made for any of these reasons be suppressed. Nor, of course, does the Constitution require officers to discourage suspects from making statements for these reasons. The Self-Incrimination Clause prohibits only *compulsion*, not every show of authority or official act that might induce a person to speak. "The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions." *United States* v. *Washington*, 431 U.S. 181, 187 (1977); see *Rhode Island* v. *Innis*, *supra*, 446 U.S. at 303 (absent interrogation, authorities need not give *Miranda* warnings before engaging in "subtle compulsion" of a suspect in custody); *Oregon* v. *Mathiason*, *supra*, 429 U.S. at 495; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 224 (1973). No constitutional value is offended by the use of a statement that a suspect has made imprudently, or in order to gain some emotional release, or because of a vague perception that he will be treated more leniently if he is cooperative (see *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975)).[4]

2. a. We recognize that, beyond inducing a suspect to speak voluntarily, an arrest might sometimes be conducted in a way that gives rise to the kind of coercion

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[4] Moreover, there is no requirement that the police give *Miranda* warnings in order to dispel any compulsion that might result from an arrest itself. See *Rhode Island* v. *Innis*, *supra*, 446 U.S. at 300. The authorities are free to arrest a suspect and permit the pressure generated by the arrest to cause him to volunteer a statement. *Ibid.*, quoting *Miranda*, 384 U.S. at 478.

that the Self-Incrimination Clause does forbid. The remedy for such potential coercion, however, is not to require *Miranda* warnings but to permit the suspect to attempt to show that his statement was involuntary in the traditional sense. See, *e.g.*, *United States* v. *Washington*, *supra*, 431 U.S. at 188, citing *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961) ("whether, considering the totality of circumstances, the free will of the [speaker] was overborne"). *Miranda* warnings are likely to be ineffective in preventing the kind of coercion that can arise at an arrest scene, and the *Miranda* exclusionary rule is not needed to avoid the difficulty of proving, in individual cases, that particular statements were the product of coercion.

A suspect might be coerced into speaking at the arrest scene, for example, if the arresting officers decide actually to threaten him with physical harm in order to compel him to speak. But *Miranda* warnings are likely to be useless to prevent this kind of coercion. If the officers who arrested respondent were determined to threaten him with physical harm in order to find out where the gun was, they could easily have recited *Miranda* warnings before making their threat; if respondent believed he was so threatened, he would scarcely have been reassured by those warnings, because he would correctly perceive that they were given only for the sake of appearances. His remedy would be to show that his statement was in fact coerced.

Moreover, when a suspect claims that arresting officers coerced him into answering questions that were asked incident to the arrest, a court should be perfectly able to determine—by traditional means and without indulging any empirically dubious presumptions—whether the incriminating answer was in fact compelled. *Miranda* emphasized that custodial interrogation of the kind with which it was concerned took place in private, shrouded with secrecy that made it very difficult for a court subsequently to reconstruct the events that occurred and the

psychological pressures they generated. See, *e.g.*, 384 U.S. at 445. By contrast, an arrest will, as we noted, generally occur either in public or in an environment familiar to the suspect. There is a reasonable likelihood that neutral witnesses, or witnesses favorable to the suspect, will be present. The encounter during which questioning can be regarded as incident to arrest will, as we explained, be brief and, compared with a lengthy, complex, and manipulative course of stationhouse interrogation, easy to reconstruct.

Miranda warnings, in short, are not an all-purpose prophylaxis for every form of police coercion; they are designed for persistent interrogation in a police-dominated "interrogation environment." They are not likely to be effective in preventing the relatively crude forms of coercion that are the principal danger at an arrest scene in the moments after a suspect is apprehended. Nor are the *Miranda* rules needed to detect such coercion.

b. In any event, the question is not whether *Miranda* warnings will ever be effective, or could possibly be effective, in preventing a suspect from being coerced into answering a question asked incident to an arrest. The operative principle of *Miranda* is that questioning in a certain environment is presumed to be coercive; the presumption can be overcome only if the government shows that the suspect has waived his rights after proper warnings. See, *e.g.*, 384 U.S. at 468-469, 474-476. In an incommunicado environment, dominated by officers who can conduct an interrogation of indefinite duration, this presumption is plausible. But as the Court has recognized, presumptions should not be extended beyond the context in which their empirical premises hold true. See, *e.g.*, *Leary* v. *United States*, 395 U.S. 6, 33-36 (1969); *Tot* v. *United States*, 319 U.S. 463, 467-468 (1943). "Given the severity of [the *Miranda*] presumption * * * —which may operate in the absence of any proof of [coercion] and thus may block a legitimate response to criminal conduct," that presumption should be indulged "only in cases

in which a reasonable likelihood of [coercion] exists" (*United States* v. *Goodwin*, No. 80-2195 (June 18, 1982), slip op. 4)). A brief questioning at the arrest scene, limited to matters reasonably incident to the arrest, does not present a sufficient likelihood of the kind of coercion with which *Miranda* was concerned to justify the use of a presumption that a statement has been coerced.

Moreover, the *Miranda* rules, as we noted earlier, are prophylactic standards that are not themselves mandated by the Constitution. Since the Constitution itself does not require the use of these standards, their justification must rest on the judgment that their benefits—the gains to constitutional values that result from the use of the standards—outweigh the costs. See *Michigan* v. *Tucker*, *supra*, 417 U.S. at 450-451; *Harris* v. *New York*, 401 U.S. 222, 224-225 (1971).

The costs of applying *Miranda* to questioning incident to an arrest are substantial. Perhaps the most obvious cost is that if the arresting officers fail to give the proper warnings, highly probative evidence may be suppressed even though it is not, in fact, compelled testimony the use of which would violate the Fifth Amendment. That is what seems to have happened here.

In addition, many suspects are, as we noted, willing to make statements for emotional or psychological reasons other than coercion, and the Constitution does not forbid the use of such statements. However effective *Miranda* warnings are in dispelling coercive influences, they will undoubtedly also discourage many such suspects from speaking voluntarily—thus damaging society's interest in effective law enforcement without any concomitant gain to constitutional values.

Requiring *Miranda* warnings to accompany questioning incident to an arrest will sometimes have the additional cost of placing officers who are making an arrest in a difficult dilemma. In this case, for example, if Officer Kraft had advised respondent of his right to remain silent, respondent might have refused to disclose the loca-

tion of the gun; or, at least, so Officer Kraft might have concluded in the moments before he asked the question. Thus, if the approach of the court below prevails, arresting officers will sometimes be forced to choose between rendering evidence inadmissible and taking the risk that, by giving *Miranda* warnings, they will interfere with their own ability to complete an arrest quickly and safely. To place an officer in the position of having to make this choice, at a volatile and potentially dangerous arrest scene, is itself a considerable cost.

If these costs were offset by substantial benefits to the values protected by the Self-Incrimination Clause, they might be worth incurring. But as we have explained, the likelihood is small that questioning incident to an arrest will actually produce coercion of the kind that *Miranda* warnings are effective in dispelling. Nor does it compromise the clarity of the *Miranda* rules to treat questioning incident to an arrest differently from other forms of questioning. There is, accordingly, no justification for extending *Miranda* to questions asked incident to an arrest.

Miranda can be seen as a response to a situation, perceived by the Court, in which police officers routinely short-circuited the elaborate protections that are afforded to the privilege against self-incrimination at trial; they did so by conducting a prior, incommunicado "proceeding," featuring none of the safeguards associated with a trial, in which the accused would be coerced into giving testimonial evidence against himself. See, *e.g.*, 384 U.S. at 466, quoting *Mapp* v. *Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 240 (1973). The *Miranda* Court sought to control this extra-judicial proceeding—"the secret interrogation process" (384 U.S. at 470)—in order to protect the privilege against self-incrimination. See *id.* at 481.

Questioning like Officer Kraft's, conducted incident to an arrest, is in no sense part of such an incommunicado "proceeding" designed to elicit involuntary testimony. It is not part of an "interrogation process" at all; it is part

of the quite different process of effecting an arrest. The *Miranda* rules were simply not intended to be applied to that process. The extraordinary result reached by the Court of Appeals in this case—a result linked so tenuously to the privilege against compelled self-incrimination—excellently illustrates this point.

3. As we have shown, the Court of Appeals' holding is the product of an excessively rigid and formalistic application of *Miranda* to questioning conducted incident to an arrest. But the mischievous consequences of such an approach may not be confined to post-arrest questioning. If the Court of Appeals' facile equation of Fourth Amendment seizures with *Miranda* custody is correct, it will logically be difficult to escape the further conclusion that questioning during an investigative stop based on reasonable suspicion (see *Terry* v. *Ohio*, 392 U.S. 1 (1968)) must also be preceded by *Miranda* warnings. A *Terry* stop, like an arrest, is a seizure within the meaning of the Fourth Amendment. See 392 U.S. at 16. An officer subjecting a person to a *Terry* stop undoubtedly "deprive[s the suspect] of his freedom of action" (*Miranda*, 384 U.S. at 444); indeed, he may do so by force. *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 6. In fact, from the point of view of the suspect, a *Terry* stop may often be indistinguishable from the initial stages of an arrest.

Yet to require *Miranda* warnings before the questioning that accompanies a lawful *Terry* stop would, we submit, be manifestly inappropriate. The usual purpose of a *Terry* stop is precisely to obtain information from the suspicious individual. See *Adams* v. *Williams*, 407 U.S. 143, 146 (1972); *Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981). If the officer must begin his interview with the suspect by giving him warnings calculated to discourage him from speaking, the principal purpose of the stop will be defeated.[6] Moreover, because of the "brief

[6] As the Seventh Circuit has noted, requiring *Miranda* warnings at an investigative stop "would contravene the very purpose of the investigatory *Terry*-type stop which is to 'allow the officer to con-

and narrowly circumscribed" nature of the questioning that accompanies a *Terry* stop (*Dunaway* v. *New York*, 442 U.S. 200, 212 (1979)) such a stop "is not likely to have coercive aspects likely to induce self-incrimination" (*Michigan* v. *Summers*, *supra*, 452 U.S. at 702 n.15). This is true for precisely the same reason that questioning incident to an arrest is unlikely to produce such coercion.[6]

This Court has not had occasion to decide whether *Miranda* warnings must precede questioning during a *Terry* stop, but its opinions clearly have not envisioned that warnings would be given in such circumstances. For example, in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-882 (1975), the Court stated: "[W]e hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. * * * The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances * * *." Plainly the Court did not contemplate that, in every case, such

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firm or deny [his] suspicions by reasonable questioning, rather than forcing in each instance the "all or nothing" choice between arrest and inaction.'" *United States* v. *Jimenez*, *supra*, 602 F.2d at 143, quoting *United States* v. *Hickman*, 523 F.2d 323, 327 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). See also *Podlaski* v. *Butterworth*, 677 F.2d 8, 10 (1st Cir. 1982): "One of the primary purposes of preliminary questioning is to separate a group of persons possibly involved in a crime into those who should and those who should not be arrested—to decide whether all, some, or none should be charged. To turn all such questioning into custodial interrogation, requiring *Miranda* warnings in all cases * * * could * * * seriously interfere with the process of information gathering and on occasion force the police to cast their net of arrest too wide, significantly interfering with the liberty of the innocent."

[6] The *Miranda* opinion itself recognized the distinction between the incommunicado stationhouse questioning with which it was principally concerned and "[g]eneral on-the-scene questioning as to facts surrounding a crime" (384 U.S. at 477).

questioning would have to be preceded by *Miranda* warnings. Similarly, in *United States* v. *Cortez*, 449 U.S. 411 (1981), officers stopped a vehicle on reasonable suspicion for the "purpose [of] * * * question[ing] the occupants of the vehicle about their citizenship and immigration status and the reasons for" their suspicious activity. *Id.* at 421. While the validity of the questioning was not at issue in *Cortez*, the Court surely would have rejected any contention that evidence discovered as a result of the questioning was inadmissible because the questioning was not accompanied by *Miranda* warnings. In *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), the Court held that Border Patrol agents may, without particularized suspicion, seize persons briefly at fixed checkpoints and inquire about their "citizenship and immigration status" (*id.* at 546). Again, it seems clear that the Court did not envision that such an inquiry would have to be preceded by *Miranda* warnings.

The courts of appeals have struggled to reconcile the apparent requirement that *Miranda* warnings be given whenever a suspect is in custody with their shared sense that warnings are inappropriate when the "custody" takes the form of a *Terry* stop. Some courts have simply held that *Miranda* warnings are not required before questioning that occurs during a lawful *Terry* stop. See, *e.g.*, *United States* v. *Collom*, 614 F.2d 624, 628 (9th Cir. 1979), cert. denied, 446 U.S. 923 (1980); *United States* v. *Jones*, 543 F.2d 1171, 1173 (5th Cir. 1976), cert. denied, 430 U.S. 957 (1977) (questioning about suspect's destination permitted during a *Terry* stop of his car); *United States* v. *Hickman*, 523 F.2d 323, 326-327 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). See also *United States* v. *Rice*, 652 F.2d 521, 527 (5th Cir. 1981); *United States* v. *Blum*, 614 F.2d 537, 540 (6th Cir. 1980).

Other courts dealing with situations that resemble *Terry* stops appear to have analyzed the question whether *Miranda* warnings were required by deciding whether all the circumstances taken together created a coercive situa-

tion. See, *e.g.*, *Podlaski v. Butterworth*, 677 F.2d 8, 10 (1st Cir. 1982); *United States* v. *Grady*, 665 F.2d 831, 833-834 (8th Cir. 1981) (suspect was not "in the type of custodial surroundings which concerned the *Miranda* court"); *United States* v. *Harris*, *supra*, 611 F.2d at 172-173; *United States* v. *Jimenez*, *supra*, 602 F.2d at 144 & n.5, 146 ("The extent to which *Miranda* applies to street encounters or car stops depends on whether these encounters reflect the type of inherently coercive tactics that may often attend a station-house interrogation"); *United States* v. *Harris*, 528 F.2d 914 (4th Cir. 1975), cert. denied, 423 U.S. 1075 (1976). See also *Borodine* v. *Douzanis*, 592 F.2d 1202, 1205-1208 (1st Cir. 1979); *United States* v. *Barnes*, 464 F.2d 828, 829-830 (D.C. Cir. 1972), cert. denied, 410 U.S. 986 (1973).

These decisions of the courts of appeals are important for two reasons. First, they demonstrate the prevalance of the view that it would be inappropriate to require that *Miranda* warnings must precede brief, on-the-scene questioning, even if the suspect is "in custody" in the sense that he is not free to leave. As we noted, this Court's opinions dealing with investigative stops appear to reflect the same implicit assumption. And for the reasons we have given, questioning during a *Terry* stop and questioning incident to an arrest are generally indistinguishable insofar as their potential to create coercion is concerned; even the suspect will often be unable to distinguish between them.

Second, in order to avoid the incongruous result of requiring *Miranda* warnings during brief, on-the-scene questioning merely because the suspect was under restraint, the courts of appeals have frequently resorted to ad hoc balancing based on the facts of particular cases. The *Miranda* rules would be made more, not less, clear by explicitly recognizing that not every Fourth Amendment "seizure" creates "custody" for *Miranda* purposes, and specifically that questioning incident to an arrest or during a *Terry* stop need not be preceded by warnings.

II. NONTESTIMONIAL EVIDENCE DERIVED FROM RESPONDENT'S STATEMENT IS ADMISSIBLE AGAINST HIM EVEN IF THAT STATEMENT WAS OBTAINED IN VIOLATION OF *MIRANDA*

If, contrary to our submission, Officer Kraft was required to give respondent *Miranda* warnings before asking the location of the gun, respondent's answer cannot be used as evidence against him. But the Court of Appeals also assumed, without discussion, that the gun would itself also have to be suppressed, so that it could not be used as evidence even if the State independently linked it to respondent. That conclusion by no means follows.

A. As this Court has noted, the question whether nontestimonial fruits of a *Miranda* violation can be used as evidence against an accused has not been resolved. See *Michigan* v. *Tucker*, *supra*, 417 U.S. at 446. We addressed this question at length in the Brief for the United States as Amicus Curiae in *Michigan* v. *Tucker* (No. 73-482),[7] and we merely summarize here the argument we made in that brief.

1. The Fifth Amendment does not prohibit the government from compelling an accused to give evidence against himself; it prohibits only compelled *testimony*. It is well established that the government may require an accused to take actions that will create nontestimonial evidence that can be used against him. See, *e.g.*, *United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973); *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Schmerber* v. *California*, 384 U.S. 757, 760-765 (1966). It is, of course, clear that the gun in this case is nontestimonial evidence.

We do not dispute, however, that if the gun were discovered as the result of what is shown to have been in fact a compelled statement by respondent, it could not be used as evidence against him. *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), held that the privilege against self-incrimination prohibits the use not only of compelled

[7] Copies of that brief have been sent to the parties.

statements but of evidence derived from compelled statements.[8] *Counselman* involved a statement compelled by the threat of punishment for contempt, but we would agree that nontestimonial evidence derived from a statement that has been compelled by police interrogation practices that overbear the will of a suspect (see, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 396-402 (1978)) should also not be admitted into evidence. See *Michigan* v. *Tucker*, *supra*, 417 U.S. at 461 (White, J., concurring).

But the Court of Appeals did not suggest that respondent's statement was compelled either by threat of punishment for contempt or by abusive police practices. The gun is nontestimonial evidence derived not from a statement shown to be compelled but from a statement obtained (we assume arguendo) in violation of the prophylactic rules of *Miranda*—rules that preclude the use of many statements that are not themselves in fact compelled. When nontestimonial evidence is directly linked to *compelled* statements, it is plausible to say that the values underlying the Self-Incrimination Clause would be offended by the use of the nontestimonial evidence; but here, the nexus is between the nontestimonial evidence and testimony not shown to be compelled but merely induced in circumstances giving rise to the possibility that unprovable compulsion may have occurred. For this reason, the gun resembles nontestimonial evidence obtained from a suspect without compelling a statement, and the values underlying the Self-Incrimination Clause do not require its suppression, any more than they would require the suppression of other such nontestimonial evidence.

2. In *Murphy* v. *Waterfront Commission*, 378 U.S. 52

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[8] As we noted in our brief in *Michigan* v. *Tucker* (at 23-30), the *Counselman* opinion is vulnerable to criticism. An additional reason not to exclude nontestimonial fruits of a *Miranda* violation is that the arguably unsound rule of *Counselman* should not be extended beyond its own context—statements directly compelled by threat of punishment for contempt—in the absence of a strong showing that such an extension is needed to further the purposes of the Self-Incrimination Clause.

(1964), the Court explained the values underlying the Self-Incrimination Clause in specific terms; this explanation further suggests that the admission of the gun in this case would not be inconsistent with those values. For example, the Court referred to the "distrust of self-deprecatory statements" and suggested that there is never sufficient assurance that a compelled confession is truthful. *Id.* at 55. See also *Miranda*, 384 U.S. at 455 n.24, 470; H. Friendly, *Benchmarks* 282 (1967) ("the truly dreadful risk of the false confession"). In holding that *Miranda* does not apply retroactively, the Court has stated that voluntary statements obtained in violation of *Miranda* do not present the same danger of an unreliable or false confession. *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 730. More important, however, when only non-testimonial fruits of a statement are admitted in evidence —and must be independently linked to the accused—there is simply no danger that a person will be convicted on the basis of an unreliable or false confession.

Similarly, the Court noted in *Murphy* that the privilege against self-incrimination "reflects * * * our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt" (378 U.S. at 55). A suspect who is informally questioned by the police (unlike, for example, a grand jury witness) does not face this trilemma; he may remain silent without penalty, and even a false statement probably would not subject him to punishment. Finally, the Court in *Murphy* stressed the extent to which authorities armed with inquisitorial powers can violate citizens' privacy with their demands for self-accusation. See *ibid.* But in the context governed by the *Miranda* exclusionary rule—custodial interrogation—other constitutional provisions protect these privacy values. Specifically, under the Fourth Amendment, the authorities cannot subject any person to custodial interrogation unless they have probable cause to suspect him of a crime. The Fourth Amendment exclusionary rule enforces that prohibition. See *Dunaway* v. *New*

York, *supra*; *Brown* v. *Illinois*, *supra*. It is therefore unnecessary to extend the *Miranda* exclusionary rule to probative, reliable, nontestimonial evidence not directly linked to any actually compelled statement.

B. Even if nontestimonial evidence derived through exploitation of a *Miranda* violation ordinarily must be suppressed, an "inevitable discovery" rule should be applied to such evidence. That is, evidence that the authorities would have uncovered in any event, even if they had not obtained statements in violation of *Miranda*, should not be excluded. See *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914, 927-928 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975). We have discussed the "inevitable discovery" doctrine at length in the Brief for the United States as Amicus Curiae in *Nix* v. *Williams*, cert. granted, No. 82-1651 (May 31, 1983),[9] and no purpose would be served by repeating that discussion here.

This Court has held that the privilege against self-incrimination is fully protected when the government shows an independent source for evidence it could also have derived from a compelled statement. *Kastigar* v. *United States*, 406 U.S. 441, 459-462 (1972). As we explain in our brief in *Nix*, the "inevitable discovery" exception to the exclusionary rule is logically related to, and follows directly from, the "independent source" exception. When the government shows that it would have obtained evidence even if the accused had not spoken, there is no sense in which the accused is being made " 'the deluded instrument of his own conviction.' " *Culombe* v. *Connecticut*, 367 U.S. 568, 581 (1961) (opinion of Frankfurter, J.) (citation omitted). Moreover, *Kastigar* applied the "independent source" rule to statements that had been compelled in the clearest sense—by the threat of punishment for contempt. As we have said above, statements obtained in violation of *Miranda* cannot be equated to statements obtained through such compulsion. We also explained in our brief in *Nix* why the "inevitable dis-

[9] We have sent copies of this brief to the parties.

covery" rule does not weaken the deterrent effect of an exclusionary rule.[10]

CONCLUSION

The judgment of the Court of Appeals of New York should be reversed.

Respectfully submitted.

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AUGUST 1983

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[10] Although the lower courts made no findings of fact on the subject, this seems clearly to be an appropriate case in which to apply the "inevitable discovery" rule. Had respondent not spoken, the officers undoubtedly would have searched for the gun. The gun was apparently quite near the scene of the arrest, presumably having been hidden during the few seconds when respondent eluded Officer Kraft, and there is no indication that the gun was particularly well concealed in the cartons. It is thus virtually inconceivable that the gun would not have been found, and it seems quite unreasonable to confer on respondent the windfall of suppressing the gun simply because of the essentially immaterial mistake of the officer in asking a spontaneous question about its location.

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No. 82-1213-CSY
Status: GRANTED

Title: New York, Petitioner
v.
Benjamin Quarles

Docketed:
January 17, 1983

Court: Court of Appeals of New York

Counsel for petitioner: Santucci, John J.

Counsel for respondent: Hyman, Steven J.

Entry	Date	Note	Proceedings and Orders
1	Jan 17 1983	G	Petition for writ of certiorari filed.
2	Feb 22 1983		Brief of respondent Benjamin Quarles in opposition filed.
3	Feb 23 1983		DISTRIBUTED. March 18, 1983
5	Apr 11 1983		REDISTRIBUTED. April 15, 1983
7	May 2 1983		Record filed.
8	May 9 1983		REDISTRIBUTED. May 12, 1983
10	May 16 1983		REDISTRIBUTED. May 19, 1983
12	May 23 1983		Petition GRANTED.
			**********
15	Jun 24 1983		Order extending time to file response to petition until August 6, 1983.
18	Jul 28 1983		Joint appendix filed.
19	Aug 6 1983		Brief of petitioner State of New York filed.
20	Aug 6 1983		Brief amicus curiae of United States filed.
22	Aug 19 1983		Order extending time to file response to petition until October 6, 1983.
23	Aug 18 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Sep 20 1983		Order further extending time to file response to petition until October 20, 1983.
25	Oct 3 1983		Motion of the Solicitor General for leave to participate in oral GRANTED.
26	Oct 21 1983		Brief of respondent Benjamin Quarles filed.
27	Nov 15 1983		CIRCULATED.
31	Nov 23 1983		SET FOR ARGUMENT. Wednesday, January 18, 1984. (2nd case)
32	Jan 6 1984	X	Reply brief of petitioner State of New York filed.
33	Jan 18 1984		ARGUED.